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NEW JERSEY

SCHOOL LAW

DECISIONS

January 1, 1988 to December 31, 1988

VOLUME 2

PAGES 831-1692

Saul Cooperman
Commissioner of Education

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6441-87
AGENCY DKT. NO. 292-9/87

ROBERT SMILON,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF MAHWAH, BERGEN COUNTY,
Respondent.

Harold N. Springstead, Esq., for petitioner
(Aronshohn, Springstead & Weiner, attorneys)

Mark G. Sullivan, Esq., for respondent
(Sullivan & Sullivan, attorneys)

Record Closed: February 9, 1988 Decided: March 25, 1988

BEFORE **EDITH KLINGER**, ALJ:

Robert Smilon (petitioner) a tenured psychologist employed by the Board of Education of the Township of Mahwah (Board) filed a petition of appeal with the Commissioner of Education alleging that respondent's withholding of his employment and adjustment increments for the 1987-1988 school year was arbitrary, capricious,

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and unreasonable and in violation of his tenure and seniority rights. Respondent filed an answer on September 22, 1987, and on September 24, 1987, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

After notice to all parties, a prehearing conference was held on November 30, 1987, at which time the hearing was scheduled for January 25, 1988. On that date, the matter was heard and the record was held open until February 9, 1988 to allow the parties to file briefs.

The issues to be decided are:

1. Was respondent justified in withholding petitioner's employment and adjustment increments for the 1987-1988 school year, pursuant to N.J.S.A. 18A:29A-14?

2. If not, to what relief, if any, is petitioner entitled?

UNDISPUTED FACTS

Robert Smilon has been employed by the respondent for over 20 years. Since 1984, he has been a member of the Mahwah Child Study Team (CST).

On May 26, 1987, petitioner was informed by the Mahwah Superintendent of Schools, Barrent M. Henry, that at the Board's executive session meeting on June 1, 1987, the Board was going to consider withholding his employment and adjustment increments for 1987-1988 school year.

On June 24, 1987, Smilon was notified that the Board had decided to withhold his increments for 1987-1988 school year for the following reasons:

1. You violated both state and federal guidelines governing

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the administration of psychological tests to a student. In this case, parent permission had not been secured, and your responsibility was to determine whether such permission was in the hands of appropriate administrative officials prior to testing such primary age child. Parental objection to this incident was further heightened by what was indicated as questions asked of the child, which had to do with personal family matters.

2. During the course of this school year, you have failed to adequately accept appropriate leadership provided you by Dr. Patricia Hanratty, the new administrator for the Child Study Team.

3. It has been concluded that you have failed to adequately practice the use of tact in your interactions with parents and colleagues. This weakness or failure on your part has been indicated to you in previous annual evaluations.

4. It is my understanding that you have not filed all reports within your responsibility area in a consistent and timely manner.

5. Because of professional weaknesses, as illustrated in #1 and #3 previously, I requested you, by a letter dated April 16, 1987, to modify your sabbatical proposal such that, rather than pursuing further investigation into the area of diagnosis, you pursue investigations which would provide you with better understandings and practices by which you could deal with and serve more effectively and appropriately the students and parents of our school district. To date, no response has been received to my communication.

TESTIMONY OF ROBERT SMILON, Ph. D.

Smilon, who holds a doctoral degree in psychology, came to the Mahwah school system in July 1967, as a school psychologist. In 1969, he acted as a coordinator of child study teams and special education services. In 1977, he became the supervisor and from 1984 to the present, he has been the psychologist on the Mahwah Child Study Team.

During the 1986-1987 school year, the Mahwah Child Study Team received a request to consult with the Betsy Ross School on the propriety of referring a student, C.M., for evaluation by the team. Both the principal of the Betsy Ross School, Ruth C. Spangler, and George Kreoll, the learning disability teacher consultant on the Child Study Team, felt strongly that such a referral should be made.

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After some deliberation, the parents of the child were contacted and given the reasons for recommending referral. The parents were asked to review their rights and sign a statement authorizing the evaluation. When George Kreoll came back from his discussion with the parents, he scheduled February 26, 1987 for psychological testing of the student.

During the week of February 16, Smilon was on vacation. On Monday, February 23, when he was to return to school, it snowed and school was closed; the Child Study Team usually meets together on Mondays. During the next two days Smilon was occupied with meetings reviewing individualized educational plans (IEPs) for students receiving special education. Smilon did not have the opportunity to consult with anyone regarding the testing of C.M.

On the morning of February 26, Smilon arrived at the Betsy Ross School and went to the principal's office to review C.M.'s records to make sure that everything was in order. When he arrived, however, the principal was in conference and her secretary would not disturb her. Smilon did not get to see the child's records before he began testing. At 11:30 a.m., Smilon interrupted the testing to allow C.M. to keep a dental appointment. After she left, he found out that parental approval had not been given for evaluation and that he had tested without authorization.

When Smilon reported the incident to Dr. Patricia Hanratty, his supervisor, she laughed and left the room. According to petitioner, Hanratty was the third child study administrator in the Mahwah school system in three years.

A few days later Spangler received a letter from the child's mother, who was upset that the privacy of the family was invaded without permission, and spoke to Smilon. Smilon wanted to reach the mother to assure her that the information was confidential, and Spangler tried unsuccessfully to contact her. With the assistance of Spangler, Smilon wrote a letter to C.M.'s mother explaining what had happened, informing her that all information collected was destroyed and requesting that she meet with him so that he could clear up any questions she might have.

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Subsequently, Smilon had a conference with Hanratty about the incident. This time, her demeanor was serious. She told him that she "didn't know which way to go" in regard to this incident but that she would have to do something about it. When he asked her why, she said she would think about it.

Smilon admits that his conduct of unauthorized testing was improper. However, he explained that he had contacted Spangler several times before the scheduled date and was repeatedly assured by her that the authorization for referral of C.M. would be coming. Smilon knew from past experience with her that she was skilled at getting parents to consent to a referral. In his 23 years of experience, this was the first time Smilon had ever tested a student prior to referral.

On February 27, 1987, while reviewing IEP's, Smilon received an emergency call requiring his immediate attention. He looked for Hanratty and when he did not find her, he cancelled his afternoon appointments and left the building at about noon. The secretary for the Child Study Team was not there when he left. When he called in later in the day, she told him that Spangler was looking for him. He spoke with Spangler and took care of her business with him. Smilon stated that he knew of no procedure requiring him to contact his supervisor to get permission to leave the building in an emergent situation.

When he returned to school, petitioner found that Patricia Hanratty had written him a memo concerning his leaving the building. A copy of this memo was sent to Mary Murphy, Hanratty's supervisor and the supervisor of curriculum for the school district. The memo was sent to Murphy before Hanratty discussed the matter with Smilon.

Murphy works in the central office of the school administration. Smilon was afraid that the memo would be put into his personnel file, and he asked Murphy to return it or destroy it. When she refused, Smilon initiated a grievance procedure. After a conference with Hanratty to resolve the grievance, Hanratty agreed to ask Murphy to

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return the memo. She then told Smilon that she was angry at him for making her call it back and that she was going to write a formal Concern about his testing of C.M. She asked Murphy to return the memo on March 20, 1987.

Petitioner denied knowing what the Board meant when it said that he failed to adequately accept appropriate leadership from Hanratty. This was never discussed with him before it appeared on the letter denying his increment.

He did have a meeting with Mary Murphy during the 1986-1987 school year during which Murphy expressed, in passing, her dissatisfaction with the discord between himself and Hanratty. The main topic of this meeting, however, was the assertion that two principals had complained about Smilon's interaction with parents. He expressed his surprise and said that his relations had been good over the past two years and that he would like to speak with both principals. Murphy directed him not to do so. He told her he would not be able to modify his behavior or remedy the situation if he had no specific information as to what the principals or parents felt he was doing wrong.

Only at the end of this meeting did Murphy mention what she had observed while present at a Child Study Team meeting on December 22, 1986, which she attended for the purpose of evaluating Hanratty.

A disagreement arose between Hanratty and Smilon at this CST meeting. Smilon explained that the disagreement arose over a booklet describing special education and the function of the Child Study Team in Mahwah. The parent council had asked Hanratty to modify the booklet and Hanratty asked for Smilon's assistance. He responded that he originally wrote it when he was supervisor and that now that she was supervisor it was her job to rewrite it. This disagreement occupied approximately ten minutes of the hour meeting. Smilon feels he responded to Hanratty's request in the best way he knew, that he was cooperative and not belligerent as alleged, and that in fact Hanratty had not believed him to be uncooperative. After her evaluation conference with Murphy, Hanratty had told Smilon about Murphy's comment that he was uncooperative and stated "it was news" to her that he was not cooperating with her.

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In her annual evaluation of Smilon dated April 8, 1987, Hanratty designated as a performance area needing improvement, "Uses tact in interaction with colleagues, students and parents." This is the first time any lack of tact was ever mentioned to Smilon by Hanratty and he was puzzled as to why she had never discussed it with him before including it in his evaluation. On June 15 at the end of a CST meeting, Smilon asked her which parents had complained of his lack of tact. She said that she did not personally know the parents and mentioned two names. According to Smilon, he had not seen one of the parents in three or four years and he did not recognize the name of the other parents at all. Smilon was never provided with any information as to the colleagues or students he lacked tact in dealing with.

During the spring vacation through the end of the school year, all IEPs for the entire school year were reviewed, and all reports had to be finished by the end of the school year. In the 1986-1987 school year, more IEPs required processing than in prior years. Petitioner told Dr. Hanratty that they might be falling behind because of new referrals. She responded by telling him to stop writing memos to her. When he asked her to explain, she wrote him the following memorandum dated April 13, 1987:

> In our meeting on April 8th, you requested that I put in writing my suggestion to you. My suggestion was made based on the fact that you had indicated that you were behind in writing your I.E.P.'s. I suggested that your clarifying memo/follow up actions be discussed at our Monday meetings and not take up your time writing. Obviously, there may be reasons to write clarifying memos on occasions. I trust you will use your professional judgment in this matter.
>
> I hope this clarifies your request.

Both Smilon and Kreoll were behind in processing the IEPs. They were told if they were not finished by the end of the year, their final paychecks would be withheld. They subsequently learned that the high school Child Study Team was given extra paid time to complete their work.

At the end of the term, all IEPs were completed on time.

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Smilon was surprised that the delay in processing the IEPs was used as a reason for denying his increments, since no one in the administration had expressed concern about their completion and, in fact, he was the one who had brought it to their attention.

TESTIMONY OF GEORGE KREOLL

Kreoll has been a learning disability teacher consultant in Mahwah for 19 years, for the past 18 of which he has worked with Smilon as a member of the Child Study Team.

Kreoll does the educational testing for the team and prepares some of the IEPs for the students.

One day while he was at Betsy Ross School, the principal, Spangler, approached him about a third-grade child who was having difficulty learning. On the same day, he observed the child, C.M., and conferred further with the principal and the child's teacher.

The principal requested that C.M. be referred for evaluation. At the next meeting of the Child Study Team, Kreoll became case manager for C.M., and at his suggestion the team picked dates for testing. Kreoll admits that the testing schedule is not usually set up until the team receives parental authorization for referral, but because of the team's heavy workload he wanted to be sure time would be available.

Kreoll contacted Spangler before the scheduled testing dates. At each contact, she assured him that the referral would be coming and he believed her because she was adept at getting parents to refer children for evaluation.

Kreoll had no conversation with Smilon on the status of the case the week before testing was scheduled. When Kreoll returned after the weekend, the weekly CST meeting was not held because the school was closed on account of snow. He realized that no authorization for referral existed and that Smilon was ready to test. However, the testing of C.M. began before he was able to warn Smilon that there was no parental consent.

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Kreoll stated that he observed meetings in which Smilon and Hanratty were present including the one observed by Murphy. It was not his observation that Smilon refused to accept Hanratty's leadership, nor did he notice any lack of tact on the part of Smilon in dealing with Hanratty or, for that matter, his other colleagues, parents or students.

When asked whether he noticed if Smilon was not getting his work done, Kreoll replied that, on all cases in which he was case manager, Smilon had his reports in on time. He also noted that there was a heavy caseload that year and the reviews were not proceeding as fast as he would have liked. He mentioned this problem to the school administration and was told that he had to get his work done on time. Both he and Smilon finished reviewing the IEPs by the time they were due.

TESTIMONY OF MARY MURPHY

The witness has been supervisor of curriculum for the school district for the past eight years. Part of her duties is to observe the staff. On December 22, 1986, she observed Patricia Hanratty at a regular meeting of the Child Study Team. Smilon and Kreoll were also present.

According to Murphy, Hanratty's skills were put to a great test because Smilon reacted negatively to everything she said and was resistant to accepting her ideas. Hanratty responded to him in a nonconfrontational manner which succeeded in reducing tension by the end of the meeting.

Murphy commented in her observation report on Hanratty that she showed great patience in dealing with Smilon in the conference but added: "I think if the team realizes that you are sharing information rather than outlining work for them to do, they may be more receptive and in the end may operate with a true team spirit."

She testified that Smilon's actions in the CST conference were more than simply disagreement. She described them as "almost harassment" and "hostile."

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Following the meeting, Murphy did not confront Smilon with his behavior. She decided to allow time for Smilon and Hanratty to work things out for themselves. However, she did speak to Hanratty.

Two months later, she mentioned to Smilon at length that she was concerned about his interpersonal relationships with Hanratty, with two of the principals in the school system and with parents who had complained to the Board. She explained that this was an informal meeting springing from her concern with him as a person. She felt he had shown growth in his behavior over the prior years and did not want to see him revert. She admitted she did not tell Smilon which parents had made complaints against him.

There was nothing in writing from the parents who complained about Smilon. The information had been passed on to her from the Board of Education.

TESTIMONY OF PATRICIA HANRATTY, Ph.D.

Hanratty came to Mahwah from her position as vice principal of the Ramapo Ridge Middle School. In Mahwah, she became administrator for the Child Study Team. Her Ph.D. is in educational administration.

Hanratty recalled the events surrounding the testing of C.M. in February 1987.

When approached by Smilon after the test had been administered, she recalls telling him that he had made a grievous error and that his actions were illegal. She does not remember laughing because the situation was not funny but admits she may have had some sort of nervous reaction when he told her what had happened.

According to Hanratty, a parent whose child is recommended for evaluation is given a copy of the law in regard to the special education process and informed of his rights. The parents must give their signed permission before testing can proceed. C.M.'s mother never agreed to have the child tested.

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On Friday, February 27, Hanratty received a call from a parent advocate on behalf of C.M.'s parents. She spoke to Smilon the following Tuesday. He told her that he had not shared the test results with anyone and would destroy them. She stated that this would not change the fact that the child had been tested and the parent was deeply concerned about the questions asked.

On March 24, 1987, she wrote a Notification of Concern Level IB to Smilon, requiring that he always check with the principal of a school to verify that parental permission was given before testing any children.

The witness believes that Smilon has failed to accept her leadership as the administrator for the Child Study Team. As an example, she cited an incident occurring on February 27 at 2:30 p.m. While she was meeting with the Child Study Team, she received a call from the principal of the school looking for Smilon. She found out then that he took one-half day personal leave without asking her. Usually, employees request personal days in advance. When asked on cross-examination what the rules were for emergency leaves of absence, she replied that in the Ramapo Ridge Middle School a teacher must report to his supervisor or principal before leaving. She admitted that she never saw a policy, written or otherwise, on emergency leaves of absences for other schools with respect to Child Study Team members.

Hanratty wrote a memorandum to Smilon about this incident and sent a copy to Murphy, her own supervisor, because this was protocol in her prior position. She also felt that Smilon was not viewing her as part of the administration and she wanted to report this to Murphy. The grievance filed by Smilon was resolved without further action when she retrieved the memo from Murphy on March 20. She testified that she did not believe it was necessary to retract the memorandum because, as she explained to Smilon, it was never intended to be included in his personnel file. On cross-examination, however, she stated that she believed his leaving without her permission was an impingement upon her authority and that she intended that a record of it be included in his file.

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On March 24, 1987, when she wrote the Notification of Concern Level IB to Smilon concerning the incident with C.M., she believed that this incident was grievous enough to have a record of it in Smilon's personnel file. Although this memorandum was written 20 days after she was formally notified of the event, Hanratty denies it was written because of her anger at having to recall the prior memorandum from Murphy.

Hanratty admits that she has no specialization in any of the Child Study Team disciplines and calls upon members of the team for assistance with their expertise. When she tried to do this with Smilon, he offered to do as she directed and, in fact, did carry out her orders. However, if she asked for his advice, he told her there were decisions he had made in the past when he was supervisor and it was up to her to make those decisions now. For example, when Hanratty asked Smilon how a particular procedure was handled in the past, he asked how she wanted him to do it at the present time and did as she directed. Only sometimes would he give her any of the input she was seeking.

On one occasion she had a conversation with Smilon in which she told him that she expected him to be a team player. His response was that he felt he had been a team player.

Hanratty described the meeting of the Child Study Team on December 22, 1986 at which Murphy was present. Her disagreement with Smilon arose in regard to requests made at a State monitoring conference and by parents for the update of a booklet describing the function of the Child Study Team and parents' rights. At the meeting, she felt that Smilon was antagonistic to whatever she said and that he did not feel compelled to assist her. This disagreement was one of the incidents she had in mind when she prepared his evaluation stating that he showed a lack of tact with "peers, colleagues, students."

When questioned as to what she meant by Smilon's failure to accept her leadership, Hanratty stated that she believed he followed her lead only reluctantly. She

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felt he showed hostility to her and warned him on occasion not to cross the line into her sphere of authority. Her leadership was meant to move the Child Study Team forward and to improve its performance, and she found him hostile and resistant to her purpose.

Hanratty was asked to explain which she meant by Smilon's lack of "tact with peers, colleagues and students" which she noted on his evaluation. She admitted that she had only her own experience with him to rely upon; the rest of the information was hearsay from others. When Smilon asked her with which parents there was a problem, she would not provide the names because the information was confidential. When Smilon offered to meet with the dissatisfied parents, they refused. She also told Smilon that she could not remember which of the school board members had told her about the parents' complaints.

Hanratty did not put her concerns about Smilon into writing prior to the evaluation because "she wanted to cooperate with the team" and wanted to "use persuasion" to make them work together with her.

REVIEW OF DOCUMENTARY EVIDENCE

On November 20, 1986, Hanratty observed Smilon at an IEP meeting. She commented:

> Dr. Smilon presented his psychological findings in a sensitive manner. He broached necessary topics with parents in a sensitive manner. He demonstrated by his discussion his concern about his findings and, in particular, his concern for the well-being of the student.

In an instructional observation by Hanratty of Smilon's meeting with parents on January 30, 1987, she wrote that "the communication between the parents and Dr. Smilon was open." As an additional comment, she stated:

> Dr. Smilon broached a sensitive subject, special class placement, with the parents in an empathetic manner. Throughout the discussion, he let the parents know his concern for the student and

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for them. By the end of the meeting, he had scheduled the parents to visit two sites. In addition, he assisted in designing a behavior modification program that the teachers will use during this interim period.

On Smilon's annual evaluation (final draft) dated April 8, 1987, Hanratty noted that Smilon needed improvement in his use of tact in interactions with colleagues, students and parents. In a memorandum attached to the evaluation, she wrote in relevant part:

> During the 1986-87 school year you have demonstrated your knowledge of psychology and of Mahwah Child Study Team procedures. Your knowledge of individual case histories and prior decisions have been of assistance to me. You have been willing to give your honest opinion and advice.
>
> You have provided counseling, in emergency situations, to students at the Ridge and at the high school. The message that you have to present is, sometimes, not a pleasant one. During the two observations I did of you this year, you presented information in a sensitive manner. You need to continue to work in this area and present your findings in an empathetic manner.

In his response dated April 28, 1987, Smilon wrote:

> I am confused because I have not been informed of nor do I know of specific instances that indicate that I need "improvement" in use "of tact in interactions with colleagues, students and parents." On the contrary, you have, during discussions prior to my annual summary conference, commended me upon my sensitivity and tact. I cannot at this time, therefore, give serious consideration to or comment upon this as a "performance area needing improvement." Nor do I understand the meaning, in the second paragraph of your attached comments, of my "need to continue to work in this area..." In fact, the whole second paragraph of your comments is confusing to me.

Later in his response he added his request that Hanratty provide him with "detailed and

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specific examples of instances where I have not used 'tact in interactions with colleagues, students and parents.' "

Smilon was observed on January 8, 1985, by his then supervisor Peter S. Bydlik during a classification/IEP conference. Bydlik commented:

> Dr. Smilon clearly exhibited his familiarity with this case as well as his expertise in the area of special education. Dr. Smilon logically developed his ideas as the conference progressed, while carefully soliciting comments from all involved. Dr. Smilon demonstrated a caring attitude for the child while manifesting an analytical demeanor and appropriate objectivity.

On March 4, 1985, Bydlik observed Smilon at an IEP Review/High School Program conference. The observation report describes a satisfactory interaction between Smilon and the student involved.

Bydlik's annual evaluation of Smilon, dated April 24, 1985 states that no performance area needs improvement and the following paragraph appears in the attached comments:

> For the 1985-1986 school year Dr. Smilon should sustain the high level of competence which he continues to demonstrate. Dr. Smilon has been a major contributor to a smooth transition in a year of change for the Child Study Team. Dr. Smilon has continually gone out of his way to assist the Child Study Team Administrator in a manner that has been positive, discreet and productive. Moreover, in performing his duties as psychologist, Dr. Smilon, in addition to his strengths listed in Part I of the present evaluation, has provided immediate and apparently effective counseling to students in periods of severe distress particularly at the high school level when the high school psychologist was absent. He has also provided effective counseling to the parents of handicapped pupils during periods of distress or uncertainty. Dr. Smilon has shown considerable expertise in conducting I.E.P. and classification conferences with parents and teachers. Recently Mrs. Mabie informed me of the excellent job Dr. Smilon did in a classification conference with a parent who has resisted the classification/I.E.P. process for over a year.

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In 1986, Smilon's supervisor was Frank A. Jacene. He observed Smilon on January 16, 1986 at a meeting between Smilon and teachers at the Commodore Perry School. He noted good rapport between Smilon and the teachers.

On March 14, 1986, Jacene observed Smilon performing psychological testing. He wrote, "Rapport between Dr. Smilon and the student was excellent as the student appeared relaxed and confident during the testing situation."

Jacene reported on Smilon's annual evaluation dated April 14, 1986 that no specific performance areas needed improvement. Jacene commented:

> Dr. Smilon has been of invaluable assistance in providing information throughout this school year concerning the Child Study Team procedures. His cooperativeness and genuine concern for the successful implementation of school programs for the special education student has benefitted all concerned.
>
> For the 1986-1987 school year, Dr. Smilon should maintain this same high level of concern and contribution.
>
> During this year, Dr. Smilon was confronted with decisions which required some compromise and diplomacy in order to prevent confrontation and disorder. He maintained a sense of composure and was able to arrive at an agreement on solving the problem at hand. Dr. Smilon should continue to maintain a positive relationship with administration, staff and parents by continuing to self-evaluate and utilize the responsive listening skills and sensitivity training which he has professionally acquired.

The documents submitted in evidence reveal that Smilon submitted a proposal for sabbatical leave for the half year of winter/spring 1988 on March 23, 1987. The leave was granted reluctantly on April 16, 1987 with some modification by Superintendent of Schools Barrent M. Henry. Henry's letter contains the following paragraph:

> It is also my impression that you have not provided Dr. Hanratty with the degree of cooperation, support and commitment that I would have anticipated. Please see that this situation is rectified.

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DISCUSSIONS AND FINDINGS OF FACT

The Testing of C.M.

In regard to this issue, I **FIND** the following:

There is no question that C.M. was tested improperly and in violation of the law. This fact is denied by no one. On the other hand, this mistake was the first of its kind made by a psychologist with over 20 years of experience in the school system, and there is little likelihood that it will ever be repeated by him. It is without question that Smilon did not do it purposely.

Other than the justified annoyance of the child's mother, no harm resulted from his act. The tests were destroyed and the results of the the interview have never been disclosed by Smilon. In addition, he sent a written apology to the child's mother, who seems to have dropped the matter.

Further, Smilon's supervisor Hanratty took no action in regard to this incident until March 24, four weeks after it occurred, although she was aware of it at least from March 3, 1987, when she received a copy of a memorandum dated February 27, 1987 from Ruth Spangler to Smilon. This action was not taken until after Hanratty was obliged to request the recall of a memorandum about Smilon from Mary Murphy.

Failure to Accept Appropriate Leadership

In regard to the allegations that Smilon refused to accept the leadership of Hanratty, I **FIND** the following:

At the time Patricia Hanratty assumed the position of supervisor of the Child Study Team in Mahwah, she had little or no experience in the area. It appears from the testimony, including her own, that Hanratty took little leadership role but rather sought to influence the more experienced members of the Child Study Team to assist her to make

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her decisions. Hanratty described Smilon's "lack of tact" in his relationship with her by saying that he was "cold, but courteous." She admitted that he did whatever he was directed to do and that he provided her with input, except he refused to provide advice to her in areas he considered her domain as supervisor. Although Hanratty stated that she saw her leadership role as moving the team forward and improving its performance, she appeared more interested in the procedures of the past. When members of the Child Study Team looked to her for direction as to how she wanted things handled in the present and offered to comply with her requirements, she took it as a challenge to her authority. Whatever her intent, Hanratty managed to convince the CST that she expected them to make her supervisory decisions for her.

Mary Murphy, who observed the interaction between Hanratty and Smilon during her observation of Hanratty, did not remember the subject of the dispute. She remembers Smilon as resistant, defensive and hostile, almost harassing Hanratty while she tried to conduct the meeting. Kreoll who was also present at this meeting and others did not perceive that Smilon refused to accept Hanratty's leadership. Even Murphy commented in her observation report on Hanratty that she failed to make clear to the Child Study Team what she expected of them.

Hanratty's lack of leadership is reflected in other ways: When the members of the Child Study Team turned to her because they were falling behind in processing IEPs and evaluations, Smilon was told to stop writing memos and stop asking for written clarification of her directions. When Smilon asked what parents, colleagues or students had complained of his lack of tact so that he could improve his performance, the information was withheld from him, not only by Hanratty but by Murphy as well. When Smilon left school in an emergency, Hanratty reported the matter to Murphy without giving Smilon the courtesy of speaking to him first and in the absence of any written or oral policy concerning emergency leaves of absence.

I **FIND** that Patricia Hanratty did not provide appropriate leadership during the 1987-88 school year and therefore Smilon did not fail to accept her appropriate leadership.

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Failure to Practice Tact In Interactions With Parents and Colleagues

In regard to the allegations that Smilon failed to adequately practice tact in interactions with parents and colleagues, I **FIND** the following:

This allegation is unsupported in the record in regard to previous annual evaluations. At least for the school years 1984-85 and 1985-86, Smilon is specifically praised in the annual evaluations for his positive relationship with administration, staff, parents and students. An inference was made by Murphy that there were prior problems in regard to Smilon's interpersonal relations but for two years his record remains unblemished. The accusations of tactless behavior toward parents, students and principals were anonymous and unsubstantiated by Hanratty or Murphy. Even if they were true, Smilon was given no information which might assist him to remedy his behavior before Hanratty included the accusations in his 1986-87 annual evaluation.

The accusations of tactless behavior toward colleagues reduces itself ultimately to Smilon's relationship with Patricia Hanratty. The basis for these accusations for the most part appears to be Hanratty herself and her perception of what is acceptable behavior from a colleague.

Murphy's opinion of the interaction between Smilon and Hanratty is based upon her observation of one conference and the reports of Hanratty. Although she described Smilon's behavior as hostile and resistant, Kroell, who was also present, did not notice any lack of tact on Smilon's part. Even Murphy commented in the observation report based on this meeting that Hanratty did not make clear what she expected from the Child Study Team. The message conveyed by Hanratty seems to have been that she expected the team to do her job in addition to theirs. It is not surprising that she met with some resistance.

I **FIND** the allegations that Smilon failed to practice adequate tact in his interactions with parents and colleagues to be unsupported in the record.

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Failure to File Reports In a Timely Manner

In regard to the allegations that Smilon failed to file all of his reports in a timely manner, I **FIND** the following: Kreoll testified that on all cases where he served as case manager, Smilon always had his reports in on time. The only other evidence offered as to Smilon's work was in regard to the year-end completion of the IEPs and evaluations. The Child Study Teams from the high school and the schools served by Smilon's team were overloaded with work during the 1986-87 school year. The high school CST was given extra paid time to complete its reports. Smilon reported to Hanratty that his team was falling behind because of its workload, but he received no guidance. In fact, Kroell and Smilon were told that if they did not complete their reviews by the end of the school year, their final paychecks would be withheld. Both men completed their work by the last day. Smilon's increment was to be withheld; Kroell's was not.

I **FIND** no basis in the record to support the allegation of failure to file reports in a timely manner, and the attempt to withhold his increment on this basis is arbitrary and unreasonable.

Failure to Modify Sabbatical Proposal

In regard to the allegation that Smilon failed to modify his sabbatical proposal to conform to the request of Barrent, I **FIND** the following:

There is no evidence that Smilon needed to pursue areas that would provide him with "better understanding and practices by which he could deal with and serve more effectively and appropriately the students and parents of our school district." He was never given notice of any shortcomings sufficient for him to determine what areas to pursue. All of the requests for more specific identification which he made to Hanratty and Murphy were denied or he was told that they did not have the information to give him. His evaluations for the prior two school years were good and did not indicate problem areas.

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In any event, the sabbatical leave was ultimately granted by the Board, albeit reluctantly. In the letter written by Barrent Henry notifying Smilon of the grant, it appears that the suggestion that "better understanding and practices be pursued" by Smilon on his leave arises from from his professional relationship with Hanratty and his alleged failure to cooperate with her.

I **FIND** that the demand for Smilon to alter the area to be pursued on his sabbatical leave was unreasonable and arbitrary in light of the fact that he was given no guidance into the nature of his shortcomings, if any, to be remedied.

DISCUSSION OF LAW AND CONCLUSIONS

N.J.S.A. 18A:29-14 specifically provides:

> Any board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education. It shall be the duty of the board of education, within 10 days, to give written notice of such action, together with the reasons therefor, to the member concerned. The member may appeal from such action to the commissioner under rules prescribed by him. The commissioner shall consider such appeal and shall either affirm the action of the board of education or direct that the increment or increments be paid. The commissioner may designate an assistant commissioner of education to act for him in his place and with his powers on such appeals. It shall not be mandatory upon the board of education to pay any such denied increment in any future year as an adjustment increment.

Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288 (App. Div. 1960), set forth the standard for review of a local board's action, pursuant to N.J.S.A. 18A:29-14. The Appellate Division found that "the scope of the Commissioner's review is. . .not to substitute his judgment for that of those who made the evaluation, but to determine whether they had a reasonable basis for their conclusion." Id. 296.

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Pursuant to Kopera, the Commissioner or the ALJ hearing the matter must determine by a preponderance of the credible evidence,

1. Whether the underlying facts were as those who made the evaluations claimed and,

2. Whether it was unreasonable for them to conclude as they did upon those facts, bearing in mind that they were experts, admittedly without bias or prejudice, and closely familiar with the mise en scene. Id. at 297.

In Bernards Twp. Bd. of Ed. v. Bernards Twp. Ed. Ass'n, 79 N.J. 311, 321 (1979), the discussion concerning salary increments provides some guidance in determining the rationale behind N.J.S.A. 18A:29-14. The Supreme Court specifically said,

> The decision to withhold an increment—although directly affecting the work and welfare of a teacher—is thus dependent upon an evaluation of the quality of the services which the teacher has rendered. The purpose of the statute is thus to reward only those who have contributed to the educational process thereby encouraging high standards of performance. In determining whether to withhold a salary increment, a local board is therefore making a judgment concerning the quality of the educational system. It is reasonable to assume that an adversely affected teacher will strive to eliminate the causes or bases of "inefficiency." The decision to withhold an increment is therefore a matter of essential managerial prerogative which has been delegated by the Legislature to the Board. It cannot be bargained away. (Emphasis added.)

In accord with the existing law, I **CONCLUDE** that the withholding of Smilon's increment cannot meet the first test of Kopera: The underlying facts are not as those who made the evaluations claimed for several reasons.

I **FIND** that four of the five grounds set forth by the Board for withholding petitioner's increments ultimately rest upon the reports of Patricia Hanratty and her

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evaluation of the petitioner. Aside from a short unpleasantness between Smilon and Hanratty observed by Mary Murphy, I FIND that the facts in the record do not support the four charges. Smilon could not have failed to accept appropriate leadership from Hanratty when none was offered; he cannot be punished for lack of tact toward colleagues, students and teachers without being warned that he has a problem in this area and given the opportunity to correct it. He cannot be punished for failure to complete his work in a consistent and timely manner when his standard of performance measured up to his colleagues who were not threatened with having their increments withheld; when he himself called his supervisor's attention to a problem the whole CST was having; and when his supervisor failed to respond to the problem in a meaningful way.

He should not be disciplined based upon reports and evaluations by Patricia Hanratty. I FIND that Patricia Hanratty is not a credible observer. Her actions demonstrate a lack of good faith which demands close examination of her testimony. She reported Smilon for leaving school in an emergency without investigating the facts. Although she assured Smilon that this report would not become part of his permanent file, there can be no other reason for her to have sent a copy of it to Murphy. The Notification of Concern Level 1B on the testing of C.M. was not sent to Smilon until four weeks after the incident with C.M., eight days after Hanratty was obliged to retract the memorandum from Murphy. She admits her failure to put her concerns about Smilon into writing prior to his evaluation. She refused to or could not divulge information on parent or other complaints to help him improve his performance. Her actions effectively foreclosed him from taking any steps on his own behalf until confronted with an unfavorable annual evaluation when it was too late to make improvement.

The remaining charge, that of improperly testing C.M., is insufficient to base an increment withholding upon. A single infraction by a teacher whose record of professional conduct is otherwise excellent does not warrant withholding his increment, DeOld v. Verona Borough Bd. of Ed., 1978 S.L.D. 1006 rev'g 1977 S.L.D. 1096, particularly in the present case where no significant injury resulted.

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If the purpose of N.J.S.A. 18A:29-14 is, as stated in Bernards Twp., to reward only those who have contributed to the educational process, thereby encouraging high standards of performance, that purpose is not served by denying increments to Robert Smilon. This "adversely affected teacher" cannot strive to eliminate "inefficiency or other good cause" since he has neither been evaluated fairly nor been given the opportunity to recognize and correct any shortcomings. This denial contributes nothing to encouraging a high quality of teaching.

Accordingly, I **CONCLUDE** that the Board of Education of Mahwah had no reasonable basis to withhold the increments of Robert Smilon since the underlying facts are not as those who evaluated Smilon claim and therefore it was not reasonable for the Board to base its denial upon those facts.

ORDER

It is therefore **ORDERED** that the Board pay to petitioner the difference between the salary received during the 1987-88 school year and the salary he would have received had his increments not been withheld for the 1987-88 school year. It is further **ORDERED** that the Board notify petitioner of the salary to be received during the 1988-89 school year, if still employed, which amount shall incorporate the increment for the 1987-88 school year which by this action has been ordered reinstated.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

March 25, 1988
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

MAR 2 8 1988
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAR 29 1988
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

PAR/e

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ROBERT SMILON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MAHWAH, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The Board's exceptions and petitioner's reply exceptions were timely filed pursuant to N.J.A.C. 1:1-18.4.

The Board filed four exceptions, which are summarized in pertinent part below. Exception No. 1 avers that the ALJ improperly substituted her own judgment for that of the local Board of Education in violation of the standards set forth for increment withholdings in Kopera v. West Orange Board of Education, 60 N.J. Super. 288 (App. Div. 1960).

Exception No. 2 claims that the ALJ's reliance upon DeOld v. Verona Borough Bd. of Ed., 1977 S.L.D. 1096, State Board rev'd 1978 S.L.D. 10006 is misplaced. The Board distinguishes DeOld by suggesting that petitioner in that case was found to have made a mere judgment error not related to the academic area:

> In the within matter, Petitioner's infraction was directly related to his job responsibilities, was an absolute violation of State and Federal law and also was a clear reflection of his poor interaction with his colleagues and peers, one of the reasons for his increment denial, because instead of checking with the principal who was in her office at the time, he went ahead and tested the child without determining whether her parents had consented. (Exceptions, at pp. 1-2)

Moreover, the Board claims that there is more than a single infraction in this case. It reiterates its argument made at hearing that it presented clear evidence that at a conference among petitioner, Dr. Patricia Hanratty, his supervisor, Mary Murphy, Supervisor of Curriculum, and a fellow teaching staff member, George Kreoll, petitioner's actions were "almost harassment and hostile." (Exceptions, at p. 2, quoting Initial Decision Summary of Testimony of Mary Murphy, ante) The Board contends this behavior supports the reasons for increment denial "based upon his failure to adequately practice tact and to accept the appropriate leadership provided by his superior." (Exceptions, at p. 2)

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Further, the Board claims it presented unrefuted testimony at hearing that petitioner left school without permission on February 27, 1987, contrary to unwritten Board policy. The Board contends this incident is another basis for withholding, "an indication where Petitioner did not exercise either tact or accept the leadership of his superior which would have required him to report prior to leaving school premises." (Id.)

Exception No. 3 suggests the ALJ unduly weighted the petitioner's testimony while disregarding that of the Board's witnesses. While admitting that it is part of the ALJ's function to judge credibility and she found the witness Patricia Hanratty not to be a credible observer, "she made no such finding of the witness Mary Murphy, who specifically testified as to the lack of tact that she had observed Petitioner demonstrate and that had been documented in the evaluation of Patricia Hanratty (R-1)." (Exceptions, at pp. 2-3) The Board claims this unrebutted testimony clearly supports both reasons 2 and 3 for the increment denial, as set forth in full in the initial decision, ante.

Exception No. 4 claims the ALJ prevented the Board from submitting evidence as to petitioner's prior performance record, which it claims was negative. The Board claims this is an especially grievous omission in that the ALJ relied upon DeOld, supra, for the proposition that a "single infraction by a teacher whose record of professional conduct is otherwise excellent does not warrant withholding his increment." (Exceptions, at p. 3, citing Initial Decision, ante)

The Board submits that the Petition of Appeal be dismissed.

Petitioner counters, point for point, those exceptions raised by the Board.

REPLY TO EXCEPTION NO. 1

Concerning whether the ALJ substituted her judgment for the Board's, petitioner contends that the tests under Kopera, supra, are whether the underlying facts were as those who made the evaluations claimed and whether it was reasonable for the Board to conclude as it did upon those facts. Petitioner avers the ALJ thoroughly examined the facts as presented at the hearing and concluded that the underlying facts were not as those who made the evaluations claimed, citing the initial decision, ante, in this regard. Thus, petitioner posits, the Board did not have a rational basis for denying his increment.

REPLY TO EXCEPTION NO. 2

As to the initial paragraph of Exception No. 2 which speaks to petitioner's improper testing of a pupil, petitioner cites the ALJ's decision finding that this single infraction was not sufficient to withhold his increment for the five reasons set forth in the initial decision, ante. Concerning the second paragraph of Exception No. 2 which contends that petitioner's increments

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should be withheld based upon an observation of the Supervisor of Curriculum who observed a child study team meeting, petitioner contends that he was not timely apprised of her displeasure until much later at an informal meeting. Further, petitioner contends that the ALJ found as a fact that Dr. Hanratty took little leadership role and found that she "did not provide appropriate leadership during the 1987-88 school year and therefore Smilon did not fail to accept her appropriate leadership." (Reply Exceptions, at p. 2, quoting the Initial Decision, ante)

In responding to the third paragraph of Exception No. 2, regarding his leaving the building without permission, initially petitioner claims that this argument was never advanced either in the reasons given or the testimony at hearing as grounds for withholding his increment. Further, petitioner posits again those arguments he presented at hearing including that the memo written by Dr. Hanratty concerning this incident was removed from his file, after he filed a grievance in this matter. Thus, petitioner argues, there was ample evidence for the ALJ to conclude that the record did not support the allegation that petitioner failed to practice adequate tact in his interactions with parents and colleagues, and he cites the initial decision, ante, in this regard.

REPLY TO EXCEPTION NO. 3

In response to the Board's arguing that the ALJ disregarded the Board's witnesses, petitioner claims he submitted overwhelming documentary evidence supporting the position that the withholding of his increment was arbitrary, as did the testimony of petitioner's witnesses. Again, citing the initial decision for the ALJ's conclusions in this regard, petitioner further contends:

> It is difficult to reconcile how the respondent could castigate petitioner's criticism of certain ideas advanced by Dr. Hanratty with his evaluation which compliments him stating "you have been willing to give your honest opinion and advice." (Exhibit P-14).
>
> (Reply Exceptions, at p. 4)

Thus, petitioner contends that even with an independent analysis giving due consideration to the ALJ, the decision should be affirmed.

REPLY TO EXCEPTION NO. 4

In replying to the Board's exception that the ALJ erroneously excluded certain evidence, petitioner states that all evaluations and observations of him since the school year 1984-85 were in evidence. Assuming arguendo that there was something negative in petitioner's employment before that time, "it is certainly remote and not relevant to the present hearing." (Reply Exceptions, at p. 4) Thus, petitioner submits, there was no abuse of discretion on the part of the ALJ.

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In conclusion, for the reasons set forth in the initial decision and the replies set forth above, petitioner urges the Commissioner to direct that his salary and/or adjustment increment be restored with interest.

Upon his careful and independent review of the record before him, the Commissioner adopts as his own the findings and determinations of the Office of Administrative Law as clarified below.

Initially, the Commissioner notes that the record does not include transcripts of the hearing below. As no evidence was presented by the Board to convince the Commissioner that the ALJ erred in making the credibility determinations she did, in the absence of such proofs he adopts those credibility determinations embodied in the initial decision, mindful of his obligation to give "attentive consideration to the ALJ's recommendation***." In re Morrison, 216 N.J. Super. 143, 158 (1987) He adopts, therefore, as his own, the credibility determinations established by the ALJ below.

Acknowledging that the standard of review before the Commissioner in a withholding of increment matter is that set forth in Kopera, supra, the Commissioner will approach the review of this matter by determining whether the underlying facts were as those who made the evaluations claimed and whether it was reasonable for the Board to conclude as it did upon those facts. In so doing, this decision will address seriatim each of the Board's proffered bases for withholding petitioner's increments for the 1987-88 school year.

In the matter of the testing of C.M., the Commissioner recognizes the seriousness of petitioner's admitted violation of state and federal statutes and regulations governing the administration of psychological tests to a student. He in no way condones such misadventure. He eschews petitioner's impatience in pressing forward with such an interview without having carefully followed through the procedures established by the Board for determining whether such consent had been supplied.

However, the Commissioner agrees with the ALJ that it was the first such mistake on petitioner's part in 20 years of service in the school system, he immediately reported the matter, he was apologetic, he endeavored to correct the mistake in every possible way and, further, there was no resultant harm to the child or family as a result of this episode.

Thus, while this event in and of itself might otherwise constitute a reasonable basis for withholding of an increment, under the circumstances there are numerous extenuating circumstances to establish this as an insufficient basis for withholding his increment especially since it was not made a part of his evaluation for the year (P-14) or any other bona fide observation report. He finds therefore this incident does not rise to the level requiring the withholding of petitioner's increments notwithstanding the fact that the error demonstrated was related to the academic area. DeOld, supra

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FAILURE TO ACCEPT APPROPRIATE LEADERSHIP

A. Leaving the Building on February 27, 1987

The record before the Commissioner is devoid of any written policy pertaining to the procedures for personal leave. However, it is noted that the ALJ mentioned in the initial decision, ante, that "[u]sually, employees request personal days in advance." Be that as it may, the Commissioner cannot state strongly enough his dissatisfaction with any employee's abandoning his/her station without so much as a word to anyone in the building of intent to leave. Had petitioner been unable to find his immediate supervisor or the child study team secretary, common sense would dictate he report to the main office to apprise someone on the staff of the emergency at hand and of his intention to leave the building. The Commissioner finds it entirely irresponsible on petitioner's part to have left without so notifying in writing or in person of his need to leave. A call after the fact is certainly inadequate to relieve him of his responsibility as a teaching staff member to account for the whereabouts during working hours.

Notwithstanding the conclusion that this incident alone establishes sufficient basis for the withholding of petitioner's increment, the Board failed to include this incident as a reason for withholding. The Commissioner therefore must conclude that this matter was not a consideration in the Board's decision to withhold and is, therefore, an unreasonable and arbitrary basis proffered after the fact for withholding petitioner's increments, notwithstanding the Board's belated attempt to bootstrap this incident onto another basis for withholding his increment.

B. CST Meeting of December 22, 1986

The Commissioner acknowledges that the behavior and attitude of a subordinate may indeed be influenced by the attitude, style and personal interrelations which may exist with that individual's superior. Therefore, the ALJ's analysis of that relationship between Dr. Hanratty and Dr. Smilon may be appropriate in determining whether petitioner's behavior was deliberately hostile.

Notwithstanding the relevance of such matters, the Commissioner must observe that the ALJ in the instant matter may have gone beyond her responsibility in assessing such behavior by virtue of her conclusory statements such as that found in the initial decision, ante, wherein Judge Klinger stated:

> When members of the Child Study Team looked to her for direction as to how she wanted things handled in the present and offered to comply with her requirements, she took it as a challenge to her authority. Whatever her intent, Hanratty managed to convince the CST that she expected them to make her supervisory decisions for her.

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The issue herein is to establish whether facts before the Board at the time it made its decision to withhold were as claimed and whether, based on those facts, its action was reasonable. Based on the record before him, the Commissioner finds Dr. Hanratty's own testimony as summarized by the ALJ to be most revealing. She stated at hearing that the relationship between her and Dr. Smilon was "cold, but courteous." (See Initial Decision, ante) Absent any written concern either in her annual report of Dr. Smilon, or otherwise, the Commissioner finds there is insufficient data to establish this alleged personality conflict as a basis for withholding petitioner's increments, especially since without any formal notice of perceived personality conflicts, Dr. Smilon was without a means of rectifying the alleged problem of his failing "to adequately accept appropriate leadership provided you by Dr. Patricia Hanratty***."

FAILURE TO PRACTICE TACT IN INTERACTIONS WITH PARENTS AND COLLEAGUES

It must be borne in mind that the written comments of Ms. Murphy, Curriculum Supervisor, concerning the interaction between Dr. Smilon and Dr. Hanratty were made in Dr. Hanratty's observation report, not Dr. Smilon's. That Dr. Smilon was called into an informal meeting with Ms. Murphy concerning her perception of conflicts between him and Dr. Hanratty did not provide a productive means of helping Dr. Smilon to overcome any such concerns, since the record is devoid of any documentation as to how he was to correct the matter, nor who the parents were who allegedly complained of his interactions with them. Thus, the Commissioner cannot find that the Board had before it facts upon which to conclude as it did at No. 3 of its reasons for withholding that:

> It has been concluded that you have failed to adequately practice the use of tact in your interactions with parents and colleagues. This weakness or failure on your part has been indicated to you in previous annual evaluations. (P-2)

As to the Board's exceptions that the ALJ disallowed the admittance of evidence in this regard, the Commissioner has perused all of petitioner's annual evaluations since the 1984-85 school year when he became part of the child study team. Without the transcripts and with no further indication in the record to support this claim, the Commissioner dismisses such exception as being without merit.

FAILURE TO FILE REPORTS IN A TIMELY MANNER

For the reasons stated in the initial decision, ante, the Commissioner adopts as his own the findings therein of the Office of Administrative Law. He concludes therefore that there is no basis in the record to support the allegation of failure to file reports

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in a timely manner, and the Board's attempt to withhold petitioner's increments on such basis is arbitrary, capricious and precipitous.

FAILURE TO MODIFY SABBATICAL PROPOSAL

Here the Commissioner finds a conflict in the positions of the parties. Petitioner's post-hearing submission states at page 12, "The Petitioner testified that he did modify his sabbatical plans an (sic) on April 30, the Petitioner signed a 'Promissory Note' in which he agreed to return to school district subsequent to his sabbatical leave." However, the Board's post-hearing submission at pages 8-9 states, "Lastly, the Board withheld Smilon's increment because he neither timely filed necessary reports nor responded to the Superintendent's directive to him to modify a sabbatical proposal."

The ALJ did not address this apparent discrepancy, neither did the exceptions. Notwithstanding the factual issue of whether petitioner did in fact so modify the proposal, the Commissioner is in accord with the ALJ that "the demand for Smilon to alter the area to be pursued on his sabbatical leave was unreasonable and arbitrary in light of the fact that he was given no guidance into the nature of his shortcomings, if any, to be remedied." (Initial Decision, ante)

Moreover, any such reasons presented to a teaching staff member should be conveyed by the Board, not the superintendent. The fact that the superintendent listed as reason #5 that petitioner failed to meet his requirement that Dr. Smilon modify his sabbatical proposal makes it unclear whether the Board had before it all such reasons at the time it resolved to withhold petitioner's increment.

Accordingly, the Commissioner adopts as his own the findings and conclusion of the Office of Administrative Law, as clarified herein. It is therefore directed that the Board pay petitioner the difference between the salary received during the 1987-88 school year and the salary he would have received had his increments not been withheld for that school year. It is further directed that the Board notify petitioner of the salary to be received during the 1988-89 school year, if still employed, which amount shall incorporate the increment for the 1987-88 school year which by this decision has been ordered reinstated.

COMMISSIONER OF EDUCATION

May 13, 1988

Pending State Board

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6171-87
AGENCY DKT. NO. 209-7/87

BOARD OF EDUCATION OF THE
TOWN OF NEWTON,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION,
DIVISION OF FINANCE,

Respondent.

Ellen S. Bass, Esq., for petitioner
(Rand, Algeier, Tosti, Woodruff & Frieze, attorney)

Marlene Zuberman, Deputy Attorney General, for respondent
(W. Cary Edwards, Attorney General of New Jersey, attorney)

Record Closed: March 16, 1988 Decided: March 28, 1988

BEFORE: WARD R. YOUNG, ALJ:

I.

The Newton Board of Education (Board) alleged the New Jersey Department of Education, Division of Finance (Division) erred as a matter of law in its determination that the Board is responsible as the district of residence for the education of E. L.

The Division avers its determination is proper and seeks dismissal of the Petition of Appeal.

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The matter was transmitted to the Office of Administrative Law as a contested case on September 11, 1987, pursuant to N.J.S.A. 52:14F-1 et seq. A telephonic prehearing conference was held on November 12, 1987 at which the parties agreed to file a jointly executed Stipulation of Facts and submit the matter for summary decision. The matter was briefed and the record closed on March 16, 1988, the date established for final filing.

II.

The following stipulated facts are adopted herein as **FINDINGS OF FACT:**

1. E. L. is a ten year old youngster who was placed on March 6, 1986 at the Holley Center in Hackensack, New Jersey, by the Division of Youth and Family Services (DYFS). Her date of birth is September 25, 1977.

2. DYFS accepted jurisdiction of E.L.'s case on February 2, 1977. At that time, E. L. lived with her natural parents, K.L. and E.L. at 22 York Road, Newton, New Jersey.

3. On February 8, 1983, E. L. was placed by DYFS in a foster home in Sussex, New Jersey.

4. On February 8, 1983, E. L.'s mother moved to the Waldemere Hotel in Newton, New Jersey.

5. On August 24, 1983, E. L. was placed in a second foster home in Vernon, New Jersey.

6. On May 1, 1985, E. L.'s father moved to 5 Amherst Place, Upper Montclair, New Jersey.

7. On May 1, 1985, E. L.'s mother returned to 22 York Road, Newton, New Jersey.

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8. On March 30, 1986, E.L.'s mother moved to 83 Avon Place, Vineland, New Jersey.

9. By letter dated February 17, 1987, Melvin L. Wyns, Director, Bureau of School Finance, State of New Jersey, Department of Education, advised Dr. Harry Selover, Superintendent of Schools, Newton Board of Education, that upon the request of the Department of Human Services, the Bureau of School Finance had determined that the district of residence for funding purposes for E.L. was Newton. A copy of this letter is attached hereto as Exhibit A.

10. By letter dated March 10, 1987, Dr. Selover advised Vincent Calabrese, Assistant Commissioner of Education, Division of School Finance, that the Board of Education contested the determination of district residence for E.L. A copy of this letter is attached hereto as Exhibit B.

11. By letter dated April 1, 1987, Mr. Calabrese affirmed Mr. Wyns' determination that Newton is the financially responsible school district for E. L. (Exhibit C).

12. By letter dated June 17, 1987, Elsie J. Lorber, Supervisor, Child Study Team, Newton Board of Education, again corresponded with the Division of Finance relative to the accuracy of its determination that Newton was the financially responsible district for E.L. A copy of this letter is attached hereto as Exhibit D. Dr. Lorber included with her letter a social work update dated May 14, 1987. A copy of this social work update is attached hereto as Exhibit E.

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13. The Division of Youth and Family Services (DYFS) has had legal custody of E.L. at all times relevant to this dispute. A November 23, 1987, Order continuing DYFS's custody of E.L. and her siblings, K.L., L.L. and F.L., is attached hereto as Exhibit F. DYFS obtained legal custody of E.L. on March 17, 1983.

I hereby stipulate and agree to the foregoing facts and to the admissibility of the attached documents into evidence.

Also determined to be a **FINDING OF FACT** is the March 6, 1986 placement of E.L. by DYFS at the Holley Center residential facility in Hackensack, New Jersey where she remains as of this date. See, Exhibit A at paragraph 7. [I believe this stipulation was inadvertently omitted.]

III.

The gravamen of this dispute is the proper application of the statutory and/or regulatory scheme in order to effectuate the intent of the Legislature. The statute and regulations to be reviewed are as follows:

18A:7B-12. District of residence; determination

For school funding purposes, the Commissioner of Education shall determine district of residence as follows:

a. The district of residence for children in foster homes shall be the district in which the foster parents reside. If a child in a foster home is subsequently placed in a State facility or by a State agency, the district of residence of the child shall then be determined as if no such foster placement had occurred.

b. The district of residence for children who are in residential State facilities, or who have been placed by State agencies in group homes, private schools or out-of-state facilities, shall be the present district of residence of the parent or guardian with whom the child lived prior to his most recent admission to a State facility or most recent placement by a State agency.

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If this cannot be determined, the district of residence shall be the district in which the child resided prior to such admission or placement.

c. If the district of residence cannot be determined according to the criteria contained herein, or if the criteria contained herein identify a district of residence outside of the State, the State shall assume fiscal responsibility for the tuition of the child. The tuition shall equal the State average net current expense budget per pupil plus the appropriate categorical program support. This amount shall be appropriated in the same manner as other State aid under this act. The Department of Education shall pay the amount to the Department of Human Services or the Department of Corrections.

6:20-5.3 Method of determining the district of residence

(a) The district of residence for school funding purposes shall be determined according to the following criteria:

1. The "present district of residence" of a child in a residential State facility defined in N.J.S.A. 18A:7A-3 and referred to in paragraph one of N.J.S.A. 18A:7B-12(b) shall mean the New Jersey district of residence of the child's parent(s) or guardian(s) as of the last school day of September of the pre-budget year.

2. The "present district of residence" of a child placed by a State agency in a group home, private school or out-of-State facility also referred to in paragraph one of N.J.S.A. 18A:7B-12(b) shall mean the New Jersey district of residence of the child's parent(s) or guardian(s) as of the date of the child's initial placement by the State agency. In subsequent school years spent in the educational placement made by a State agency, the child's "present district of residence" shall be determined in the same manner as for a child in a residential State facility as set forth in 1, above.

3. The "district of residence" referred to in paragraph two of N.J.S.A. 18A:7B-12(b) shall mean the New Jersey district of residence in which the child resided with his or her legal guardian immediately prior to his or her initial admission to a State facility or placement by a State agency.

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(b) The commissioner shall determine the "present district of residence" or "district of residence" referred to in N.J.S.A. 18A:7B-12(b) based upon the address submitted by the Department of Corrections or the Department of Human Services on forms prepared by the Department of Education.

(c) The commissioner shall notify district boards of education of the determination of the district of residence.

(d) A district board of education contesting the commissioner's determination of district of residence shall submit a written notification that a dispute exists to the Assistant Commissioner, Division of Finance, within 30 days of the receipt of a final notice that a child was determined to be a resident of the district for purposes of State funding. As part of this written notice, the following information shall be submitted:

1. A written statement detailing the effort of the district board of education to verify the determination of the commissioner;

2. Written rationale for rejecting the determination of the commissioner;

3. Any additional information the district board of education has obtained which might enable redetermination of the district of residence.

(e) The Division of Finance shall attempt to resolve the dispute administratively and shall notify the district whether a redetermination of district of residence will be made within 90 days of the receipt of the written notification that a dispute exists.

(f) A district board of education may initiate a formal proceeding before the commissioner to resolve such a dispute if the Division of Finance is unable to resolve a dispute within the 90 day time limit, by filing a Petition of Appeal with the commissioner pursuant to the provisions of N.J.A.C. 6:24-1.1 et seq.

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6:20-5.4 Address submission for determining the district of residence

(a) The address submitted to the Department of Education for determining the district of residence for school funding purposes for a child described below shall be the address defined below:

1. If the State has custody of the child or if a court or the State has appointed a third party as the custodian of the child, the present address of the parent(s) or guardian(s) with whom the child resided immediately prior to his or her initial admission to a State facility or placement by a State agency shall be submitted.

2. If the child's parents are divorced with joint guardianship, the present address of the individual parent with whom the child resided as of the date required by N.J.A.C. 6:20-5.3(a)1 or 2 shall be submitted.

3. If the child never resided with his or her parent(s) or guardian(s), the address of the facility, group home, or private school shall be submitted.

4. If the child's sole parent or legal guardian resides in a State facility, the address of the State facility wherein the parent or guardian resides shall be submitted.

IV.

The Board argues that N.J.S.A. 18A:7B-12(a) is applicable to determine the district of residence because DYFS was granted legal custody of E. L. on March 17, 1983 and residential placement at Holley Center was effectuated on March 6, 1986. The Vernon school district should be the district of residence, it argues, because DYFS placed E.L. in a Vernon foster home on August 24, 1983 after being given legal custody of the child.

The Board concedes that section (a) does not address the district of residence for children who are wards of the State. I **FIND** section (a) to be inapplicable. If the Legislature intended this section to apply as the Board argues, it most easily could have and would have said so. As the section clearly states, the district of residence of a child placed by DYFS from a foster home shall be determined as if no such foster placement had occurred.

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We now turn to section (b) of the statute, which, in paragraph one, indicates the district of residence to be the present district of residence of the parent or guardian with whom the child lived prior to his most recent placement by DYFS. It cannot be disputed that E.L. lived with her parents at 22 York Road, Newton, since February 2, 1977 until her first foster home placement on February 8, 1988, at which time the mother left the father by moving to the Waldemere Hotel located in Newton. The mother moved back into the residence at 22 York Road on May 1, 1985 when the father moved to Upper Montclair. The mother then moved from Newton to Vineland on March 30, 1986, approximately three weeks after the DYFS placement of E.L. at Holley Center on March 6, 1986. Since the father resided in Upper Montclair and the mother in Newton at the time of Holley Center placement, the Division argues that paragraph two of section (b) must be utilized to determine the district of residence, which is the district in which the child resided prior to her residential placement. This district, the Division argues, is Newton.

Further support of the Division's position is found in N.J.A.C. 6:20-5.3(a)1, which refers to the present district of residence incorporated in section (b) of the statute to be that of the parents as of the last school day of September of the pre-budget year. Pre-budget year is defined in N.J.S.A. 18A:7A-3 as "the school year preceding the year in which the school budget will be implemented." Since the funding responsibility for E.L.'s Holley Center placement on March 6, 1986 begins with the 1985-86 school budget, September 30, 1984 must be deemed to be the parental residential date referred to in the regulatory scheme. On that date, both E.L.'s father and mother resided in Newton, although living separately. **I SO FIND.**

V.

I am empathetic to the plight of the Newton school district with funding for a child placed by DYFS and neither parent residing in the community, since the father moved to Upper Montclair on May 1, 1985 and the mother moved to Vineland on March 30, 1986.

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It would not seem reasonable that the Legislature intended perpetual funding responsibility in such a circumstance. The undersigned is vested with the authority to construe meanings from the statutory and regulatory schemes, but has not been clothed with authority to amend them. Presuming the correctness of the interpretations herein, relief of Newton's plight may only be sought through the legislative process.

VI.

I **FIND** the Newton Board of Education to be responsible as the district of residence for the education of E. L. as a matter of law.

I **CONCLUDE**, therefore, that Summary Decision is **GRANTED** to the Division and **DENIED** the Board. The Petition of Appeal shall be and is hereby **DISMISSED**.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Commissioner Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

28 March 1988
DATE

WARD R. YOUNG, ALJ

MAR - 4 1988
MAR 31 1988
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

MAR 31 1988
DATE

Mailed To Parties:

FOR OFFICE OF ADMINISTRATIVE LAW

g

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BOARD OF EDUCATION OF THE TOWN OF NEWTON, SUSSEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record of this matter, the Commissioner agrees with the findings and the conclusion of the Office of Administrative Law that the Newton Board of Education is responsible as the district of residence for the education of E.L. as a matter of law, but for the reasons articulated below not for those bases set forth in the initial decision.

Initially, the Commissioner corrects what apparently is a typographical error in both the Joint Stipulation of Facts and the ALJ's recitation of said facts as incorporated in the initial decision, at page 2 where it is stated:

> 2. DYFS accepted jurisdiction of E.L.'s case on February 2, 1977. (emphasis supplied)

If this date were accurate, DYFS would have accepted jurisdiction of E.L.'s case seven months before she was born. The Commissioner suggests that the proper date might be February 2, 1983, but without convincing evidence he can only correct the record to the extent of noting that the 1977 date must be erroneous. He further corrects the date of E.L.'s first foster placement date erroneously stated at page 8 of the initial decision as having been February 8, 1988 to be February 8, 1983.

While the Commissioner agrees with the ALJ below that N.J.S.A. 18A:7B-12(a) is inapplicable to the instant facts, he finds that whether E.L. is a ward of the State is not the proper basis for so finding. Instead, the Commissioner deems section (a) of no bearing on this case because at the time the matter was brought to the Commissioner's attention, E.L. was neither in a foster home setting nor in a State facility. Holley Center in Hackensack, New Jersey is a New Jersey Department of Education approved private school for the handicapped. However, it does not meet the

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definition of State facility as set forth in N.J.S.A. 18A:7A-3 as amended April 1986:

> "State facility" means a State residential facility for the retarded; a day training center which is operated by or under contract with the State and in which all the children have been placed by the State, including a private school approved by the Department of Education which is operated under contract with the Bureau of Special Residential Services in the Division of Developmental Disabilities in the Department of Human Services; a State residential youth center; a State training school or correctional facility; a State child treatment center or psychiatric hospital. (emphasis supplied)

No such contract with the Bureau of Special Residential Services in the Division of Developmental Disabilities in the Department of Human Services exists with the Holley Center. Thus, E.L. falls outside the provisions of N.J.S.A. 18A:7B-12(a).

Section (b) of the statute, paragraph one, does apply to E.L., however, since her placement at Holley Center can be subsumed under the language of that section (N.J.S.A. 18A:7B-12(b)) which states:

> b. The district of residence for children who are in residential State facilities, or who have been placed by State agencies in group homes, private schools or out-of-state facilities, shall be the present district of residence of the parent or guardian with whom the child lived prior to his most recent admission to a State facility or most recent placement by a State agency. (emphasis supplied)

when read in pari materia with N.J.A.C. 6:20-5.3(a)2. This regulation states:

> The "present district of residence" of a child placed by a State agency in a group home, private school or out-of-State facility also referred to in paragraph one of N.J.S.A. 18A:7B-12(b) shall mean the New Jersey district of residence of the child's parent(s) or guardian(s) as of the date of the child's initial placement by the State agency. In subsequent school years spent in the educational placement made by a State agency, the child's "present district of residence" shall be determined in the same manner as for a child in a residential State facility as set forth in 1, above.

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The Commissioner finds the ALJ's having found additional support for Newton's being responsible for E.L.'s educational costs in N.J.A.C. 6:20-5.3(a)1 inapplicable because that section refers to placement in a residential State facility as defined by N.J.S.A. 18A:7A-3, which it has been determined is not a label applicable to Holley Center. Instead, N.J.A.C. 6:20-5.3(a)2 is applicable.

The New Jersey district of residence of the child's parents as of the date of E.L.'s initial placement by the State agency was unquestionably Newton. E.L. was living with both of her parents at 22 York Road, Newton at the time of her first foster home placement on February 8, 1983. Since this determination is easily reached by reference to the first paragraph of N.J.S.A. 18A:7B-1(b) read in conjunction with N.J.A.C. 6:20-5.3(a)2, there is no need to reach to the second paragraph of N.J.S.A. 18A:7B-12(b) which states:

> ***If this cannot be determined, the district of residence shall be the district in which the child resided prior to such admission or placement.

Accordingly, the Commissioner adopts the initial decision only insofar as the ALJ concludes that the Newton Board of Education is responsible as the district of residence for the education of E.L. as a matter of law. In so modifying the initial decision, the Commissioner further finds the ALJ's gratuitous comments relative to the intent of the Legislature in fashioning the pertinent statutes in question to be extraneous and of no moment. Thus, the ALJ's rationale in reaching his findings and conclusion are not made a part of this decision.

Consequently, Summary Decision is granted to the Division and denied the Board. The Petition of Appeal is hereby dismissed with prejudice.

COMMISSIONER OF EDUCATION

May 13, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 0018-87
AGENCY DKT. NO. 391-12/86

BERGEN CENTER FOR CHILD DEVELOPMENT, INC.,
Petitioner,

V.

DIVISION OF SPECIAL EDUCATION,
NEW JERSEY DEPARTMENT OF EDUCATION,
Respondent.

Ralph J. Padovano, Esq., for petitioner
(Beattie, Padovano, Breslin, Dunn & Kafafian, attorneys)

Arlene G. Lutz, Deputy Attorney General, for respondent
(W. Cary Edwards, Attorney General of New Jersey, attorney)

Record closed: February 9, 1988 Decided: March 30, 1988

BEFORE JAMES A. OSPENSON, ALJ:

After a preliminary fiscal and a program compliance monitoring report of the Division of Special Education of the Department of Education was issued on June 19, 1986, the Bureau of Auditing of the Department notified the Bergen Center for Child

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Development Inc., that monitoring had determined certain non-allowable costs had been charged by petitioner's accountants to the 1985-86 educational program, that such costs could not be included in calculation of the 1985-86 audited tuition rate, that they must be itemized as non-allowable costs and charged to an unrestricted fund in a non-profit school or to retained earnings in a school for profit. Specifically, it was said, salaries of some five uncertified teachers must be included as such non-allowable costs and so charged for reason of lack of New Jersey certification for positions in they were employed, as required by N.J.A.C. 6:20-4.4(a)(3) and N.J.A.C. 6:28-4.1(g).

In a petition of appeal filed in the Bureau of Controversies and Disputes of the Department of Education on December 1, 1986 (and later amended by petition filed in the Office of Administrative Law on March 18, 1987), petitioner sought judgment setting aside determinations of respondent and any consequent obligations upon petitioner resulting from N.J.A.C. 6:20-4.8(d), determining petitioner in respect of its employees had employed only properly certificated personnel, and declaring that judgment of non-allowability of costs totaling $80,825 was arbitrary and erroneous. The Department admitted the determinations below, holding them proper as non-allowable costs under N.J.A.C. 6:20-4.4 and sought declaratory judgment that petitioner had employed professional personnel contrary to N.J.A.C. 6:28-4.1(g), that the actual tuition rate to be charged by petitioner for 1985-86 is less than its estimated tuition rate, and, finally, judgment determining that petitioner be required to pay or credit each sending district board of education for the difference between the estimated tuition rate and the actual tuition rate after the appeal on the audit is resolved, pursuant to N.J.A.C. 6:20-4.8(d)(1).

The Commissioner transmitted the matter to the Office of Administrative Law on January 2, 1987 for hearing and determination as a contested case in accordance with N.J.S.A. 52:14F-1 et seq.

On notice to the parties, the matter came on for continued prehearing conference in the Office of Administrative Law on June 1, 1987 and an order was entered.

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It was provided that at issue in the matter generally were the following:

(1) whether petitioner shall have established by a preponderance of the credible evidence that Department application of N.J.A.C. 6:20-4.1(g) and N.J.A.C. 6:20-4.4(a)(3) to circumstances concerning the five employees in question was arbitrary or erroneous as a matter of law;

(2) but if not, whether the Department is entitled to relief as demanded by it under N.J.A.C. 6:20-4.8(1). [Subsumed therein are all factual questions concerning employee certifications].

On August 12, 1987, the Department filed a motion to dismiss the petition of apppeal for untimely filing under N.J.A.C. 6:24-1.2, which provides:

> To initiate a proceeding before the Commissioner to determine a controversy or dispute arising under the school laws, a petitioner shall file with the Commissioner the original copy of the petition, together with proof of service of a copy thereof on the respondent or respondents. Such petition must be filed within 90 days after receipt of the notice by the petitioner of the order, ruling or other action concerning which the hearing is requested.

The motion was accompanied by the Department's brief with annexed exhibits detailing correspondence between the parties. Respondent contested the motion with its answering brief and annexed exhibits. In a written decision on motion, the administrative law judge denied the Department's motion to dismiss the petition of appeal. The order was reviewable by the Commissioner on application under N.J.A.C. 1:1-14.10 or at the end of the contested case pursuant to N.J.A.C. 1:1-18.6. It was not reviewed interlocutorily.

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Thereafter, the matter came on for hearing in the Office of Administrative Law on October 13, 14 and 15, 1987 and December 14, 1987. Thereafter, time for posthearing submissions having elapsed, the record closed.

EVIDENCE AT HEARING

I

Called by petitioner, Adrienne Lefebvre testified she has been director since July 1, 1970. Bergen Center for Child Development, Inc., is a parent-sponsored, non-profit corporation for classified educational students, serving Hudson, Morris, Bergen and Essex Counties. Special education students from local boards in those counties are served based upon their needs and their educational plans. A non-resident day school, its school serves emotionally disturbed and neurologically impaired student primarily. There are eight classrooms, eight teachers and one or two classroom aides. Every effort to give full implementation to federal law and N.J.S.A. 18A:46-1 is made. Individual educational plans (IEPs) are fashioned by each sending district through its child study team. They contain long and short term objectives and recommendations for particular goals, with related services. Bergen asks both parents and local child study teams to visit the school before placement. The student is interviewed at an in-take session to determine whether the school can do its job. The school gives its own battery of tests through its own LDT/C or psychologists to set its own goals. An agreement is reached and the district board (LEA) is notified. An annual guide for goals, objectives and compliance with the IEP is established. All parties then sign off their agreement. One of the "related services" is art therapy, in which all students participate. In each case, that circumstance is told to parents and the LEA before admission. The school has two art therapists for emotionally disturbed pupils and six for neurologically impaired pupils. All pupils get related services. Bergen Center is approved by New Jersey as a private school for delivery of special education services; its approval is reviewed by the Department every three years. In the year 1985-86, the average number of pupils in the school was 75.

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Lefebvre identified P-1 in evidence as an example of the annual instructional guide for every student at Bergen. On page 8 was indicated "art therapy" as a related service. P-2 in evidence was a preliminary evaluation report and a completed monitoring summary by the Department and its Division on Special Education for 1981-82. A reference to the work of art therapist is contained on page 3; a summary of the school's operation then is contained at pages 12 and 13. At the time, in 1981-82, Lefebvre said, Kathleen Davies was the school's art therapist. She was then completing a certification process at NYU in the American Association of Art Therapist. She had a master of arts degree in art therapy from Ohio State University. She was not certified in New Jersey, however, as teacher of art. The monitoring report at page 4 of P-2 contained a recommendation that the art therapist continue to pursue her requirement for her New Jersey teaching certificate. Lefebvre said students are not taught "art" by the art therapist as such. They are taught merely to respond in therapy and to expand their views. Lefebvre's response to the monitoring report in 1982 was P-3 in evidence, in which at page 3 she noted the art therapist's enrollment at New York University for art therapy. P-4 in evidence was the Department's final evaluation report for 1981-82, in which no change was made from the preliminary report concerning recommendations for the art therapist's certificate completion efforts. P-5 in evidence was a job description of the art therapist at Bergen Center; no New Jersey certificate requirement is listed. The art therapist was to plan and execute a wide variety of creative activities of a prescriptive, directive, as well as a non-directive nature. Specific programs in ceramics, pottery and vocationally oriented activities were also to be developed. Special art events, test entries and scenarios for plays were examples of an array of art-related functions coordinated by the art therapist.

P-6 in evidence was a letter from the Bureau coordinator of private schools of the Division of Special Education on January 15, 1986, enclosing data for a self-study to be prepared by Bergen Center. The monitoring team arrived in May 1986 and remained for three days. The monitoring was more thorough than in 1982. The Bureau coordinator,

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Carmen Serrano, returned to the school in June 1986 and submitted parts of the monitoring evaluation. That monitoring report was P-7 in evidence; it contained all recommendations except financial recommendations, which were given in July 1986. Lefebvre was informed by Serrano that Bergen Center had fifteen days to respond; Lefebvre did so by July 15, 1987; her response is P-9 in evidence.

P-10 in evidence was a letter of the Chief of the Bureau of Auditing of the Department to Bergen's accountant on July 16, 1986 informing that under N.J.A.C. 6:20-4.4(a)(3), salaries of the following uncertified staff, including employer contributions from time of employment to the time proper certification for the position they are in employed in is received, were determined to be non-allowable costs:

Vicki Kreiss - teacher of the handicapped
Kerri McCormick - art therapist
Dorothy Sommer - art therapist
Barbara Szegda - school nurse
Denise Colaneri - assistant director/supervisor

[Colaneri left the employ of Bergen Center; and Kreiss ultimately received her teacher of the handicapped certification. At hearing, Bergen Center withdrew its challenge to non-allowability of costs as to Colaneri's salary. Pb. at 8].

P-11 is a letter of the Director of the Division of Special Education to Bergen Center on August 28, 1986, noting final approval could not be granted until the school nurse, Barbara Szegda, and the two "art teachers," D. Sommer and K. McCormick, receive full certification under New Jersey education regulations.

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According to Lefebvre, Dorothy Sommer and Kerri McCormick were the two art therapists at Bergen Center in 1985-86. Bergen Center was informed by letter of the Bergen County superintendent of schools on September 24, 1986, (P-12) that Szegda could apply for an emergency certificate as school nurse and Sommer and McCormick would be given extension of time to applied for provisional certification, with the understanding that if Sommer and McCormick apply under the alternate route, the school could not be reimbursed for salary costs. The letter was communicated to the Director of the Division of Special Education by Lefebvre's letter of October 15, 1986 in P-13. Lefebvre said Denise Colaneri, who began work in Bergen Center in July 1985 has not responded to the present hearing. She did not return to the school after May 1986 and is not presently involved in the school now. Lefebvre said Vicki Kreiss received her New Jersey certification as teacher of the handicapped in May 1986. In the Fall of 1987 she returned to New York City but did work for the school in 1986-87.

Lefebvre said Barbara Szegda received emergency certification in September 1986 and is pursuing courses at Seton Hall University to complete requirements for school nurse certification.

Richard Balletto, a self-employed CPA, is controller of Bergen Center. He acknowledged having talks in 1986 with an auditor from the Department of Education concerning non-allowable costs for uncertified staff, as elicited from monitors. Donald Quinn, a CPA and public school accountant, was commissioned by Bergen Center as auditor. He acknowledged receipt of P-10, a letter from the Chief of the Bureau of Auditing of the Department on July 16, 1986, informing of employment by Bergen Center of five employees not properly certified under N.J.A.C. 6:20-4.4(a)(3). He acknowledged receipt of a letter from James W. Verner of the Department on November 6, 1986, concerning the uncertified employees employed by Bergen Center in 1985-86 as detailed in the monitoring report.

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Called by Bergen Center, Barbara Szegda, a registered nurse and now employed as school nurse by Bergen Center since September 1983, testified she holds a B.S. degree in nursing from Long Island University in 1969, an M.S. degree in nursing from New York University in 1974 and an M.A. degree in nursing education in January 1976 from New York University. She is presently attending Seton Hall University in order to fulfill academic requirements for New Jersey school nurse certification under N.J.A.C. 6:11-12.9, an educational services endorsement. She applied for entry to Seton Hall in July 1986 and entered its program in September 1986. From 1976 to 1982, she was an assistant professor at Felician College in Lodi.

She conceded she held no New Jersey school nurse certification during her employment at Bergen Center. She was aware of the results of the 1982 Departmental monitoring. She received emergency certification for one year from August 1, 1986 to July 31, 1987 from the County Superintendent as school nurse under N.J.A.C. 6:11-4.3. [The regulation provides that an emergency certificate is a sub-standard one-year certificate issued only in the fields of administration, educational services, and other technical fields. It is only issued on application of a public school district that declares its inability due to unforeseen shortages or other extenuating circumstances to locate a suitably certificated teacher.]

Szegda said Seton Hall curriculum includes historical and philosophical foundations of education and a two-part school nursing program, second of which is a practicum. She said she would have 12 credits by the end of the present semester.

Called by Bergen Center, Kerri McCormick testified is now an assistant to an art therapist at Bergen Center. In 1985-86, she was an art therapist; she began in January 1983. She holds a B.A. in art therapy from Mercyhurst College in 1984. In her work as art therapist in 1984-1986, she said she would work under Dorothy Sommer with students through art media, depending on student needs. She said she never taught art as such. In

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art therapy, students would release their energies and frustrations or aggressions in group sessions by the half or full hour. She sometimes taught alone without Sommer. She once was a member of the American Art Therapy Association, Inc., but no longer is because her dues ran out. She said anyone can join the Association; no accreditation is necessary.

Called by Bergen Center, Vicki Ann Kreiss testified she presently resides in New York City and is employed at St. Barnabas School in the Bronx as a teacher of regular and special education. She holds a B.A. degree in elementary education from Hunter College in 1979 and an M.S. in special education from the College of New Rochelle in 1982. She received her New York teaching certification in special education in June 1982. But see P-16, effective date September 1, 1982. She received her New Jersey certification as teacher of the handicapped in May 1986. See P-19.

Kreiss applied for teacher of the handicapped certification through Bergen Center's auspices to the Bergen County Superintendent on September 17, 1985. See P-17 and P-18. She began work at Bergen Center on September 1, 1985. She assumed she was qualified as a teacher of the handicapped in all of 1985-86 but, as she conceded, did not receive her New Jersey certification until May 1986 under N.J.A.C. 6:11-8.4(c)(4). Thus, she said, she taught at Bergen Center without New Jersey certification in 1985-86 until May 1986.

Called by Bergen Center, Jane Palumbo Lastella testified she is a psychologist in private practice and has worked for Bergen Center since November 1986. She holds a Ph.D. in school psychology from Yeshiva University in 1982. She is certified in New Jersey since 1982 as a school psychologist. She is licensed in New Jersey as a psychologist since February 1986. Asked her opinion on the effectiveness and necessity of art therapists in special education, she said she thought art therapy is a valued "related service" for handicapped children. She conceded art therapy is not such a related service under New Jersey rules but felt it was under federal regulations.

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Called by Bergen Center, Laurie J. Wilson testified she is an associate professor of art therapy at New York University in its department of art and art education. She holds a Ph.D. in art history from City University of New York in 1978. She is a professional member of the American Art Therapy Association, Inc., since 1972 and was on its executive board as chairman of the membership committee for four years. She served on its education and honors committees. AATA represents art therapists in the United States and abroad. It is a national association accepted federally and in states as representative of the industry. It sponsors conferences and lobbies by maintaining standards of credentialling, education and training. Classes of membership are student, professional, credentialled professional and associate. P-20 in evidence is a booklet of adopted revised standards and procedures for registration in AATA.

Wilson said Dorothy Sommer is a "registered" art therapist by AATA, as having met its criteria for professional competence in art therapy. She did not know the date. Kerri McCormick is now in the application process but is not yet "registered."

There is difference between teaching art and art therapy, she said. The art teacher tries to teach art and impart a body of skills and knowledge. The art therapist has a different goal: to work toward amelioration of pathology or re-functioning of normal development processes of children suffering from educational handicaps. The art therapist enters class without a plan beyond the goals related to the pathology of the child. She felt art therapy is a "related service" under federal regulations in 34 C.F.R., comment, section 300.13. She conceded that New Jersey does not so recognize the activity as a related service.

Called by Bergen Center, Laura Joles, certified in New Jersey as teacher of the handicapped since Janaury 1986, has been employed by Bergen Center since then. She teaches a class of ten neurologically impaired students, who leave class for art therapy, gym or music. She is familiar with art therapy and has noted its beneficent application.

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Petitioner Bergen Center rested.

II

Called by the Department of Education, William G. Boyle testified he is assistant manager, Bureau of Programs and Services, North II, Division of Special Education, Department of Education, and coordinator of private schools for the handicapped rendering educational services in Bergen and Essex Counties. His duties as coordinator include responsibility to oversee monitoring of schools for the handicapped in and out of New Jersey, in [illegible]pproval process. He has had experience as a teacher of the handicap, principal of a special education hospital, director of related services and special services in a multi-handicapped school and county supervisor for child studies. He is familiar with the monitoring process for private schools for the handicapped; their programs are approved by his office. There are approximately 126 schools in New Jersey. Students are sent to the schools when local districts have no appropriate programs; the students remained public school students and the schools operate under the same regulations as public school districts. Each private school must submit an application for annual approval. In a two-tier program, his office examines certifications of the staff and health and safety measures. A second part of the monitoring process is an on-site review by a team of peer monitors. The latter occurs once every three years. In the monitoring process, a school in preparation is asked for self-evaluation guide first and a remedial plan is established. Next comes a pre-site monitoring, followed by on-site monitoring. Finally, there is an exit conference with team members present with school officials. Opportunity for rebuttal of findings is afforded, as required under N.J.A.C. 6:28-9.1. Ultimately, if there is no appeal, the private school must then develop a plan for remediation. If there is no remediation, his office can condition approval or deny approval.

All teachers in the private schools are required to be certified appropriately at dates of their employment under N.J.A.C. 6:28-4.1(g); schools cannot employ uncertified

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personnel. Purpose of the regulation, he said, was to avert risk of harm to students. Under N.J.A.C. 6:20-4.4(a)(3), he said, the Department does not consider personnel are certifiable, if not actually certified. If a private school wishes to supply a service not through certified personnel, the cost becomes a non-allowable cost, for example, he said, music therapy or art therapy. The latter if not done by a certified teacher of art is a non-allowable cost. The Department required Bergen Center to have a certified teacher of art furnish art therapy because of the job description: actually, he said, such persons were art teachers in reality. Asked why the Department did not accept a private associational "registration" like AATA instead of New Jersey State certification, he said because there is no appropriate standard: the Department wanted full New Jersey certification. Such private associations have no standing because they are private, non-governmental groups. Non-allowability of costs does not depend upon the opinion of school directors that their staff are qualified. N.J.A.C. 6:28-4.1(g) provides that all professional personnel serving educationally handicapped pupils shall hold the appropriate New Jersey certification or license commensurate with their assignments. The word "hold" does not mean merely "be eligible for."

Called by the Department, Elaine Ware testified she is assistant manager of the Division of Special Education, so employed since May 1986 and employed by the Department since 1980. An individual educational program (IEP) is an individual educational plan for the handicapped student; there is a basic plan and an instructional guide prepared by the district board. The private school function is to complement both. A "related service" is a supportive service determined by the local board and is not considered a part of the IEP unless put there by the local board. Thus, she said, Bergen Center's annual instruction guide (P-1) is not an IEP, rather only the school's instructional guide. If art therapy is included in it and not required by the local board, it is not required and not to be funded by the local board.

Ware identified R-4 as a departmental memorandum to directors of approved private schools for the handicapped dated August 13, 1980. Its subject was certification of professionals. In paragraph 2 it was provided expressly that "effective September 1978

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professionals were to be employed initially only when possessing the certificate commensurate with the assignment. [Emphasis added]. In paragraphs 5 and 6 it was provided that ancillary persons teaching special subjects or providing special services and supportive professionals must possess certificates commensurate with their assignments.

According to Ware, R-5 was part of Bergen Center's self-study guide submitted in 1981, filed in the Department and used in the monitoring of 1982. Page 3 showed incomplete staff certification and/or licensure. Page 13 called for corrective action by the art therapist to complete certification requirements by June 30, 1981. R-6 in evidence was Ware's letter to Lefebvre of March 30, 1981 reminding of obligation to complete certification of supervisory and other personnel. R-1 was Bergen Center's 1981 application for budget approval containing, at page 6, an undertaking to hire an art therapist as of September 1981 possessed of certification as teacher of art. R-7 was coordinator Ware's directive to private school directors dated May 3, 1982, cautioning that certification assurance statements were enclosed for execution and completion. R-8 in evidence were Ware's handwritten notes of an exit conference at Bergen Center in 1982 questioning certification of the art therapist as teacher of music or teacher of art. R-10 in evidence was the Department's budgeting and accounting manual for approved private schools for the handicapped, revised May 1984, indicating, at page 3, that salaries of professional staff who were not certified or licensed but were functioning in certifiable positions were non-allowable costs. R-2 in evidence was a detail of the annual budget approval of Bergen Center in August 1984, which listed Dorothy Sommer, improperly, as a certified teacher of art. As to that, however, the monitors relied on Bergen Center's assurance. R-12 was a letter from the Director of the Division of Special Education to private school directors on September 13, 1984, reminding that all private schools should maintain a file copy of each staff member's certificate, which in turn should be recorded in the county superintendent's office. R-13 in evidence, the Director's letter to private schools on May 7, 1985, contained the same cautionary reminder. R-14 in evidence was Lefebvre's affidavit to the Division of Special Education dated May 15, 1985, certifying

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the program met the standards of and was conducted in full compliance with rules and regulations of the State Board of Education adopted pursuant to N.J.S.A. 18A:46 and federal legislation. In 1983, she said, art therapists were non-allowable costs; and private non-regulatory registration by AATA was not an acceptable certification. At that time, there was no mechanism to require rebates to districts; Department policy then was to let uncertified staff have time to achieve certification. In 1986, however, the State Board adopted N.J.A.C. 6:20-4.8(d), which required rebates by private schools to local districts if necessary adjustments were uncovered as a result of audits or monitoring.

Ware gave the opinion that there is no such thing as "de facto" eligibility or a priori eligibility; one is not "eligible" until New Jersey certification issues. There is no such thing as "certificate" eligibility; "teaching" eligibility is the issue.

Called by the Department, Carmen Serrano, currently Bureau coordinator for private schools for the handicapped, North II, Bergen and Essex Counties, since 1985, testified her duties include monitoring some 32 schools for the handicapped. She approves programs, budgets and waivers. She has had teaching experience as teacher of the handicapped. She holds the B.S. degree from Rutgers University in special education in 1979 and the M.S. degree from Trenton State College as teacher of the handicapped in August 1985. She holds New Jersey certifications as teacher of the handicapped, elementary teacher, teacher of Spanish and reading specialist. She was chairperson of the Department monitoring team at Bergen Center in May 1986.

Shown P-6, Bergen Center's self-study evaluation prior to monitoring dated October 30, 1985, she noted Lefebvre's statment of assurance as director that the document was correct and complete. She noted Bergen Center's assurance on page 4 of P-6, an assurance that all administrative, instructional and support staff held appropriate certifications and that they were on record in the county office of education. P-7, the May 12-15, 1986 monitoring report of Bergen, in section 2 showed the monitors had starred the staff certifications of Kreiss, Szegda, McCormick, Sommer and Colaneri.

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Kreiss had no teacher of handicapped certification at the time, nor did McCormick. There was no record that Sommer had a teacher of art certification. Colaneri had teacher of the handicapped certification but none as supervisor. Szegda was not certified as a school nurse. The conditional approval of the Department on August 28, 1986 in P-11 signified Bergen Center could not accept new students until deficiencies were corrected. At that time Colaneri had left the school; Kreiss had received her certificate. At the time, neither case was at issue. Later, the approval status of Bergen Center in conditional status was changed because records showed McCormick and Sommer were not in an alternate program for teacher of art certification. She was informed in May 1987 by the Department's Office of Certification that they were denied alternate route because there was no art teacher at Bergen Center under when they could work.

Called by the Department, Celeste Rorro testified she is employed as director of teacher certification and academic credentials in the State Department of Education and as secretary of the State Board of Examiners. The certification of teachers is a licensure process for the practice of teaching. The State Board of Education establishes standards therefor. A candidate can ask for an evaluation of credentials for purposes of eligibility. The evaluation is done in her office. Asking for an evaluation is not the equivalent of applying for certification. After applications are approved by her office, they are given to the State Board of Examiners for issuance of certification. Shown P-17, the application for certification by Vicki Ann Kreiss dated September 11, 1985 (P-17), she said the issuance date is not the filing date. "Eligible" signifies a time when everything has been approved by her office. There is no such thing as "de facto" certification or eligibility. A principal as a teaching staff member cannot determine eligibility of a teacher. Reciprocity among states is not automatic. Though New Jersey is signatory to a multi-state compact, one cannot assume one is eligible. Between New York and New Jersey, there is no reciprocity as to New Jersey teacher of a handicapped certification and a New York special education certification. Under N.J.A.C. 6:11-3.1(a) a teacher may not work without a certificate; an applicant may not work if certification is still in negotiation. Under N.J.A.C. 6:11-4.3, issuance of an emergency certificate is not

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automatic: the county superintendent must approve; her office must review. Such a certificate is not renewed indefinitely. All teachers at private schools for the handicapped must be appropriately certified. The New Jersey Department of Education does not recognize registrations or certifications by professional associations such as AATA. The Department does not issue teacher certification based on membership in AATA.

Called by the Department, Angelo Castellano testified he is employed as an education specialist in the Bergen County superintendent's office. He handles certification applications. His record in R-19 showed issuance of an emergency school nurse certificate to Barbara Szegda in October 14, 1986.

His notes concerning Denise Colaneri (R-20) showed no issuance of any certificate as supervisor.

R-21, Denise Colaneri's application for supervisor certificate, showed credentialing necessary in two areas. The same was shown in a Colaneri application for supervisor certification on June 20, 1986. His notes concerning Vicki A. Kreiss showed issuance of certificate as teacher of the handicapped effective May 1986 and recorded in the Bergen County superintendent's office on June 10, 1986.

The Department rested.

III

Called by Bergen Center in rebuttal, Charles Legos, employed by the Bergen County superintendent's office, testified he was participant in the monitoring process of Bergen Center in May 1986. He was there one day in an on-site facility inspection. Checking names for persons and certifications with the State computer, he furnished

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results of this search to the monitoring chairperson.

C lled by Bergen Center, Dorothy Sommer testified she is an art therapist at Bergen Center and has been so employed for the past five years since the Fall of 1982. She holds B.A. and M.A. degrees in art, art education and counseling and human services. Her duties from 1982 to date were to provide individual sessions in art therapy. She supervised the whole program with Kerri McCormick and consulted with school psychologist, the director and teachers concerning program and objectives in accordance with directions of the IEPs. She said she did not teach art. Art is education for its sake. Art therapy is in service of other development of the child. In May 1986, during monitoring, she said, she held no New Jersey certification. She is a registered art therapist in AATA since 1979. See P-25. She is now certified as a teacher of art in New Jersey, having applied for it in January 1987 after finishing two courses at Jersey City State College, and after taking a National Teachers Education exam in art education in November 1986. .' ;ibits P-21 through P-25 concern Sommer's AATA certification and her progress toward New Jersey certification.

FINDINGS OF FACT

The parties having submitted proposed Findings of Fact as requested by the administrative law judge under N.J.A.C. 1:1-14.7(a), having considered such proposals, I shall adopt those proposed by the Department, with modifications:

1. Bergen Center received over a period of years many notices reminding it of the requirement that professional staff serving the educationally handicapped must be certified (R-4, R-6, R-7, R-10, R-11, R-12, R-13).

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2. In its annual application for approval of its budget, in order for the school to become an approved private school for the handicap Director Lefebvre repeatedly signed certifications of assurances that all staff members were appropriately certified (R-7, R-11, R-12, R-13, R-14, P-2, P-4, P-6, R-1, R-2).

3. As part of its program, Bergen Center has provided all pupils with art therapy. In its annual application for approval of its budget in order for the school to be approved, the Director affirmed that it intended to hire an art therapist in 1981, who would be required to hold the certificate of teacher of art in order to fill that position (R-1).

4. The monitoring report of Bergen Center in 1982 inquired whether all staff held appropriate certification and/or licensure "as required by the State." The Director assured that State required certificates were in progress (R-5).

5. The monitoring report of the school in 1982 advised the school that the art therapist should complete the requirements for her certificate (P-4).

6. In an exit conference with the Director, Eileen Ware, of the Department of Education, who conducted the 1982 monitoring of Bergen Center, indicated to the Director that the art therapist was required to have a certificate as teacher of art (R-8).

7. In its budget for the 1984-85 school year, the Director attested to the fact that D. Sommers was providing regular instruction as a teacher of art, and that the certificate of teacher of art was required for the position (R-3).

8. In its self-evaluation dated February 14, 1981, the Director acknowledged that the art therapist would complete the certificate required by the State by June 30, 1981 (R-5).

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9. On a post-site visit after the 1982 monitoring, to assure compliance with the corrective action plan, the monitor checked with the county office to see if the art therapist had completed the requirements for the teacher of art certificate, and found she had not (R-9).

10. In a self-evaluation required prior to the monitoring by the Department of Education in 1986, Bergen Center indicated that all staff members held appropriate certification (P-6).

11. A copy of the monitoring report was given to the Director on the last day of the monitoring, May 12, 1986 (P-7).

12. Frank Domin of the Department of Education, on July 2, 1986 met with the Director and Richard Balletto, the CPA for Bergen Center, to discuss the financial section of the monitoring report. Domin informed Balletto and the Director that the salaries of the five non-certified staff members were non-allowable costs (P-&). In her letter of July 15, 1986 to the Department, the Director disputed the fact that the salaries for professional staff were non-allowable costs (P-9).

DENISE COLANERI

1. Denise Colaneri in the 1985-86 school year functioned in the position of assistant director, supervising the teachers as principal (P-7), a position that required her to be certified, N.J.A.C. 6:11-8; 11-10.2; 11-10.4; 11-10.9.

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2. She applied through the Bergen County superintendent for an evaluation of her credentials for certificate as supervisor on May 28, 1985. Her application was returned to her on April 2, 1986 because she had never completed the application process (R-20).

3. She reapplied for an evaluation for the certificate of supervisor on May 1, 1986, and this time she supplied all necessary documentation (R-20).

4. By evaluations dated May 13, 1986 (R-21) and June 20, 1986 (R-22), she was informed that she was not eligible for a certificate as supervisor.

BARBARA SZEGDA

1. In 1983 the school nurse, Barbara Szegda, had sought an evaluation of her credentials to see if she could receive a certificate as school nurse. She was informed that, notwithstanding her having taught nursing, she lacked credits to be a school nurse. She had not taken any of the required courses nor obtained her certificate before being employed by Bergen Center (P-19).

2. Her application to the Office of Teacher Certification was no longer open; her money had been refunded on January 9, 1984 (P-19).

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VICKI KREISS

1. Vicki Kreiss was employed by Bergen Center as teacher of the handicapped in the 1985-86 school year (P-7).

2. Although she was certified in special education in New York, there is no reciprocity between New Jersey and other states concerning a certificate in special education.

3. Kreiss submitted an application for certification dated October 21, 1985 (P-18) and forwarded it to Bergen County Office of Education by cover letter dated November 19, 1985 (P-17).

4. As part of the instruction sheet for obtaining certification, she was informed that it was her obligation to obtain all necessary documentation supporting an application for certification.

5. A transcript necessary to complete the application was not received by Bergen County until April 24, 1986 (R-24).

6. All documentation necessary for the completion of the application was received by Bergen County on May 1, 1986 (R-23) and forwarded to Trenton for evaluation. The certificate was issued by Trenton on May 19, 1986 (R-23) and dated May 1986 (P-19).

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DOROTHY SOMMERS

1. Dorthy Sommers was employed by Bergen Center as an art therapist for the 1985-86 school year (P-7), providing services directly to pupils without supervision of certified personnel.

2. Although she was a registered art therapist, a title awarded by the American Art Therapy Association (AATA) in 1979 (P-25), the New Jersey Department of Education does not recognize for certification purposes a registration awarded by a professional group.

3. After completing certain credits required for the certificate of teacher of art, she applied for certification by letter dated January 16, 1987 (P-21), although certain documents necessary to complete application were not forwarded to the County Office of Education until April 1, 1987 (P-22).

KERRI McCORMICK

1. Kerri McCormick was employed by Bergen Center as an art therapist during the 1985-86 school year (P-7).

2. Although she possessed no New Jersey certification or licensure, she worked with 12 to 15 children a day without the presence of a certified teacher.

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DISCUSSION

Bergen Center argued generally (1) the Department determination that salaries of the school nurse and teacher of the handicapped were non-allowable costs because neither was certificated, despite eligibility for certification, was contrary to decisional law; (2) the Department determination that the two art therapists should hold certification as teacher of art was arbitrary and ultra vires; and (3) that, in all, Division and Department actions against Bergen Center since 1982 were so arbitrary and inconsistent as to invalidate findings of the monitoring team in 1985-86 and should be set aside.

Important to remember in this matter, in my view, is that non-allowability of costs for employment of uncertified teachers related to the 1985-86 school year. What may not be drawn in issue necessarily, if at all, it seems to me, is certificability of the five employees afterwards. During the critical 1985-86 school year, according to clear evidence in the record, Bergen Center employed five persons in teaching staff positions without New Jersey teaching or school nurse certification: Kreiss as teacher of the handicapped, Szegda as school nurse, Sommer and McCormick as "art therapists."[1] Whatever their actual employment, in direct teaching or in delivery of "related services," the art therapists according to their testimony and their job description in P-5 were committed individually and alone to classroom services to special education students. The issue of whether the monitoring team in 1985-86, or before then, was correct in noting the art therapists should have been certified as teachers of art is less relevant in the present posture than whether they were certified at all.

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1 Non-allowability of Colaneri's employment cost is no longer challenged by Bergen Center. See above at 6.

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N.J.S.A. 18A:27-2 provides that any contract or engagement of a teaching staff member shall cease and determine whenever the employing board of education shall ascertain in any manner that such person is not holder of appropriate certification for employment. More quickly to the point, perhaps, is that N.J.S.A. 18A:26-2 provides that no teaching staff member shall be employed by any board of education unless he/she holds a valid certificate to teach, administer, direct or supervise the teaching, instruction or educational guidance of, or to render or administer, direct or supervise the rendering of nurse service to, pupils in such public schools and such other certificate, if any, as may be required by law. The professional certification requirement is explicit in special education for the handicapped, whether by public or private schools. N.J.A.C. 6:28-4.1(g). And in the monitoring process for determination of allowability of tuition costs, State Board regulations are clear that salaries of professional staff members who are not certificated but who are functioning in positions requiring certification are non-allowable costs. N.J.A.C. 6:20-4.4(a)(3).

In the case of Kreiss, employed in 1985-86 by Bergen Center as teacher of the handicapped without New Jersey certification (P-7), and Szegda, employed as school nurse in 1985-86 without New Jersey certification, such employment was clearly in contravention of statute and regulation. In each of the five instances, moreover, since beginning of their respective employment, they were employed in contravention of explicit policy guidelines given to directors of private schools for the handicapped as early as August 13, 1980: ". . .effective September 1978 professionals [are] to be employed initially only when possessing the certificate commensurate with the assignment." [R-4; emphasis added].

Bergen Center's contention that the monitors' "determination" that appropriate certification for the "art therapist" was that of teacher of art was arbitrary[2] and, therefore, of moment in a determination of non-allowability of costs has missed the mark.

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2 Note in R-1 at 6 it was Bergen Center in July 1981 that certified an undertaking to hire an art therapist with teacher of art certification. See also R-3, 5 and 8.

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Given a clear statutory and regulatory obligation encumbent upon Bergen Center not to employ in delivery of educational services anyone without appropriate certification, the remedy available to Bergen Center before such employment, if doubt as to proper certification existed, was resort to the county superintendent, whose obligation is to determine appropriate certification and title for proposed unrecognized positions. N.J.A.C. 6:11-3.6(d). Whatever the remedy, nevertheless, the obligation of Bergen Center remained not to give employment to personnel without certification of any sort. If the monitors were not arbiters of certificate appropriateness, the county superintendent under N.J.A.C. 6:11-3.6(d) was; but Bergen Center did not resort to the process, preferring instead its own view. I cannot responsibly credit its assertion that AATA "certification" was a legitimate substitute for some kind of State certification.

The regulatory consequence of employment of the non-certified five in 1985-86 on the issue of allowability of costs under the monitoring program of N.J.A.C. 6:28-9.1 necessarily follows, unless, as Bergen Center argued, "eligibility" for certification of Szegda as school nurse and Kreiss as teacher of the handicapped compels allowability of their salary costs, retrospectively, since Szegda obtained emergency certification in September 1986 and Kreiss secured teacher of the handicapped certification in May 1987. Decisional authority presented by Bergen Center in support of a de facto "eligibility" theory, as argued by the Department here, is not apposite in the present context. Such decisional authority dealt with cases involving transfer, promotional or seniority issues of individual teachers whose rights of tenure and seniority were drawn in question. The cases cited[3] supported claims of individual teachers; the case here does not. On the contrary, the present case involves the Board's employment of persons uncertified in face of clear statutory and regulatory prohibition thereof and its, Bergen Center's, unilateral decision to continue employment and seek allowability of such employment costs nonetheless. Such employment was both deliberate and witting; to that extent,

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3 But see Nealy v. Bd. of Ed. Borough of Roselle, 1987 S.L.D. — (Com'r Ed., July 16, 1987; slip op. at 29).

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therefore, it was the employer's conduct that was arbitrary and contrary to law. Argument by Bergen Center that since the art therapists were members of AATA, a private, non-governmental, professional association of art therapists, and since there is no regulation requiring an art therapist to hold teacher of art certification, their employment was lawful, is specious. Absence of a requirement for such employment, whether in "related service" or otherwise, cannot excuse Bergen Center from responsibility for having exposed its special education students to the ministrations of personnel without any certification at all.

CONCLUSION

Based on the foregoing, and considering all the evidence, testimonial and documentary, having made Findings of Fact as hereinabove, I **CONCLUDE** that judgment should be entered as follows:

(1) Bergen Center included in calculations of its 1985-86 tuition rate non-allowable costs for employment of uncertified or improperly certified teaching personnel, contrary to N.J.A.C. 6:20-4.4;

(2) Bergen Center employed such personnel contrary to provisions of N.J.A.C. 6:28-4.1(g);

(3) The actual tuition rate in 1985-86 to be charged by Bergen Center is less than its estimated tuition rate;

(4) The petition of appeal by Bergen Center should be, and it is hereby, **DISMISSED**; and

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(5) Pursuant to N.J.A.C. 6:20-4.8(d)(1), Bergen Center for Child Development, Inc should be, and it is hereby, **ORDERED** to pay or credit each sending district board of education for the difference between the estimated tuition rate and the actual tuition rate within thirty days after this appeal on the audit is resolved by final agency head decision.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

March 30, 1989
DATE

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

March 31, 1988
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

APR 5 1988
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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BERGEN CENTER FOR CHILD DEVELOPMENT, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
DIVISION OF SPECIAL EDUCATION, NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner's exceptions were untimely filed pursuant to the applicable provisions of N.J.A.C. 1:1-18.4. As a result, neither those exceptions nor the State's reply exceptions were considered in rendering this decision.

Upon his careful and independent review of the record of this matter, the Commissioner agrees with the findings and the conclusion of the Office of Administrative Law that the statutes and regulatory scheme in the State of New Jersey require that:

> No teaching staff member shall be employed in the public schools by any board of education unless he is the holder of a valid certificate to teach, administer, direct or supervise the teaching, instruction or educational guidance of, or to render or administer, direct or supervise the rendering of nursing service to, pupils in such public schools and of such other certificate, if any, as may be required by law.
>
> (N.J.S.A. 18A:26-2)

See also N.J.S.A. 18A:27-2 which provides that:

> Any contract or engagement of a teaching staff member, shall cease and determine whenever the employing board of education shall ascertain by written notice received from the county or city superintendent of schools, or in any other manner, that such person is not, or has ceased to be, the holder of an appropriate certificate required by this title for such employment***.

N.J.A.C. 6:28-4.1(g) makes plain that professional certification is also required in special education for the handicapped, whether by public or private schools. Moreover, in the monitoring process for determination of allowability of tuition costs, State Board regulations made plain that salaries of professional staff members

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who are not certificated but who are functioning in positions requiring certification are non-allowable costs. N.J.A.C. 6:20-4.4(a)(3)

Moreover, based on his independent review of the facts, as well as the testimonial and documentary evidence, the Commissioner concurs with the ALJ that judgment in this case shall be against petitioner with the following directives, as suggested by the ALJ at page 26 of the initial decision:

(1) Bergen Center included in calculations of its 1985-86 tuition rate non-allowable costs for employment of uncertified or improperly certified teaching personnel, contrary to N.J.A.C. 6:20-4.4;

(2) Bergen Center employed such personnel contrary to provisions of N.J.A.C. 6:28-4.1(g);

(3) The actual tuition rate in 1985-86 to be charged by Bergen Center is less than its estimated tuition rate;

(4) The petition of appeal by Bergen Center should be, and it is hereby DISMISSED***.

Accordingly, the Commissioner accepts the recommendation of the Office of Administrative Law dismissing the Petition of Appeal and adopts it as the final decision in this matter for the reasons expressed in the initial decision.

COMMISSIONER OF EDUCATION

May 16, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7944-87
AGENCY DKT. NO. 351-12/87

DUMONT BOARD OF EDUCATION,
Petitioner,
v.
ANDREW ZWEIG,
Respondent.

Sidney A. Sayovitz, Esq., for petitioner
(Greenwood, Young, Tarshis, Dimiero & Sayovitz, attorneys)

James K. Riley, Esq., for respondent
(O'Connell & Riley, attorneys)

Record Closed: March 17, 1988 Decided: March 30, 1988

BEFORE JOHN R. TASSINI, ALJ:

STATEMENT OF THE CASE

The Dumont Board of Education contends that the respondent wrongfully abandoned his position as a tenured teacher (a) without having obtained the Board's "release"; (b) only 20 days after delivery of his written resignation; and (c) prior to the employment of a replacement teacher. The Board submits that the respondent's actions constitute unprofessional conduct for which the Commissioner of Education should suspend respondent's certification for one year pursuant to N.J.S.A. 18A:28 and N.J.A.C. 6:11-3.8.

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PROCEDURAL HISTORY

The Board's notice of motion for an order suspending the respondent's teaching certificate and a supporting affidavit were filed with the Commissioner of Education on October 30, 1987. On November 5, 1987, the Commissioner ordered the respondent to show cause why such an order should not be entered. On November 30, 1987, the respondent's answering papers were filed, together with the affidavit of Eugene M. White. The matter was transmitted to the Office of Administrative Law (OAL) where it was filed as a contested case on December 2, 1987. N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. In the OAL the matter was the subject of a Prehearing Order dated January 15, 1988. Pursuant to the Prehearing Order, it was heard on March 17, 1988, with testimony from four witnesses and three exhibits being admitted.

FACTUAL FINDINGS

I. Principal Genberg's testimony

Dale Genberg, principal of the Honiss School in the Dumont system, was first to testify and was a credible witness. Based upon his testimony, I **FIND** the following **FACTS:**

Mr. Genberg has been principal for the past two years. Prior to that he was a vice principal and an elementary school teacher. He is a certified elementary school teacher and principal.

The respondent was a tenured eighth grade social studies teacher in Mr. Genberg's school where the respondent was considered to be a very good teacher. On September 3, 1987, the respondent told Mr. Genberg that he planned to resign in order to accept another teaching position. Mr. Genberg told the respondent that he would set up a meeting with Paul Corazza, the Superintendent of Schools, to talk about a "release date" for the respondent.

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On September 4, 1987, the respondent met with the superintendent and delivered his written resignation (J-1). Mr. Genberg was instructed by the superintendent to begin searching for a replacement for the respondent.

On September 8, 1987, Mr. Genberg was called by Eugene White, principal of the James A. Farley Middle School in New York. Mr. White explained that the respondent had accepted a position there and he asked Mr. Genberg how long it would take to replace respondent. Mr. Genberg could give no time period, but stated that he was searching for a replacement. Mr. White then stated that his office would contact Mr. Genberg again.

On September 8, 1987, Mrs. Diane Castino, a language arts teacher in the Board's system, asked to be transferred to respondent's position. The next day, Mr. Genberg's "team" of interviewers and the superintendent agreed to recommend Mrs. Castino to the Board for the position. Mrs. Castino could not replace the respondent, however, until another teacher replaced her. On September 10, 1987, an advertisement was placed asking for applicants for Mrs. Castino's position. Mr. Genberg made the respondent aware of the situation and the respondent replied that he "hoped" his release would not be delayed.

On September 16, 1987, the respondent took a "sick" day. At "parents night" that evening, Mr. Genberg announced that the respondent would be leaving "as soon as" a replacement teacher was hired. On September 21, 1987, the respondent returned to school and Mr. Genberg advised him that no replacement was available yet. The respondent then remarked to Mr. Genberg that he hoped that the replacement process could move "faster."

On September 22, 1987, the respondent told Mr. Genberg for the first time that the next day would be his last, because he wanted to go to his new school for staff orientation on September 23, 1987. The two men shook hands and Mr. Genberg wished "good luck" to the respondent, but also told the respondent he would speak to the superintendent about the matter.

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Because of the holidays, Monday, September 28, 1987, was the next school day. Mr. Genberg telephoned the respondent at his home that evening and told him that the superintendent was "unhappy" because respondent's replacement had not yet been obtained, and that the superintendent wanted the respondent to return to work because he was not "released." Mr. Genberg denied telling respondent that the matter was "resolved" and he denied telling the respondent that there would be no repercussions or adverse claims based upon the respondent's early departure.

The respondent did not return to his class. Further, he left no lesson plan for his successor.

On Friday, October 2, 1987, Ms. Maria Viscardi signed an employment contract for Mrs. Castino's language teaching position. On that day, Ms. Viscardi also met with Mrs. Castino to assure an orderly succession. A substitute teacher had been hired to cover the respondent's class until October 5, 1987, when Mrs. Castino was to take over.

II. Superintendent Corazza's testimony

Paul Corazza, Superintendent of the Dumont Schools, was second to testify and was a credible witness. Based upon his testimony, I **FIND** the following **FACTS**:

Mr. Corazza has been superintendent for the past eight years. Prior to that he was a superintendent, a principal, a vice principal and a mathematics teacher. Superintendent Corazza is certified as a teacher, principal and administrator.

On September 4, 1987, the respondent delivered his written resignation to the superintendent (J-1). The respondent asked the superintendent about an "early release." The superintendent replied that the screening of candidates would begin right away but the respondent's release would only come after a suitable replacement was found.

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The superintendent notified the Board during its September 10, 1987 conference meeting that the respondent had submitted his resignation, and on September 17, 1987, at its next public meeting, the Board accepted the resignation effective November 2, 1987, "or as soon as suitable replacement is hired" (R-1). On September 18, 1987, the superintendent gave the respondent written notice of the Board's action (J-2).

In the meantime, the superintendent determined that Mrs. Castino was a satisfactory replacement for the respondent and he obtained permission to search for candidates to replace her. This search was carried out by Mr. Genberg.

The superintendent was away at his daughter's wedding during the week of September 21 to 25, 1987. When he returned on September 28, 1987, he was told by Mr. Genberg that the respondent had announced that he would not be back to work after September 23, 1987. The superintendent asked Mr. Genberg to convey his instruction that the respondent should return to his post.

On September 29, 1987, the superintendent met with Ms. Viscardi and on September 30, 1987, she signed a contract effective October 2, 1987. The contract lacked Board approval, but the superintendent felt he had an "emergency" justifying his seeking approval during the Board's next public meeting on October 8, 1987.

In the meantime, in the superintendent's opinion, the respondent's absence "disrupted" his class. The class had a substitute teacher for the days September 28, 29 and 30, October 1 and 2, 1987. Then Mrs. Castino took over the class with no lesson plan provided by the respondent.

III. Respondent's testimony

The respondent is a certified teacher who began his fifth year in the Board's system in September 1987. Prior to this he taught in New York State, where he is also certified. Based upon the respondent's testimony, I **FIND** the following **FACTS:**

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On September 3, 1987, the respondent was offered a teaching position in a New York school. The respondent was "excited" and anxious to take the position which, brought an increased salary and reduced commutation. On the evening of September 3, 1987, the respondent telephoned his principal, Mr. Genberg, to say he would be resigning and Mr. Genberg instructed the respondent to meet with the superintendent.

On September 4, 1987, the respondent met with the superintendent and delivered his letter of resignation (P-1). I **FIND** the respondent to be insincere and incredible in his testimony that the superintendent represented that within no more than "2 to 3 weeks" the respondent's position would be filled and he would be released. I accept that the superintendent may have expressed some hope that the process of replacement and release would take two or three weeks, but I **FIND** no representation that the respondent's release would be two to three weeks from September 4, 1987.

On September 15, 1987, the respondent learned from Mr. Genberg that Mrs. Castino was expected to take his position only after a replacement was found for her. I **FIND** that on September 15, 1987, the respondent knew that the replacement "process," necessary for his "release," might be "extended" beyond the optimistic date of September 18 to 25, 1987, i.e., "2 or 3 weeks" from September 4, 1987.

On September 21, 1987, the respondent learned from Mrs. Castino that the search for her replacement was still going on. The respondent testified that he knew on that day that his replacement and release would take "much longer" than he originally had hoped.

On September 22, 1987, the respondent announced to his fellow teachers and to Mr. Genberg that he would not be returning to his post. The respondent speciously testified that he felt his departure was justified in part because Mr. Genberg shook his hand and wished him "good luck" instead of objecting to his departure or instructing him to stay.

I **FIND** the respondent to be insincere and incredible in his testimony that even he felt "justified" in leaving his post when he did.

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I **FIND** that the respondent abandoned his class and began another job (a) knowing that he was not yet "released" from his position in the Dumont school; (b) only 20 to 24 days after delivery of his written resignation; and (c) knowing that a suitable replacement was not yet employed.

On September 28, 1987, the respondent began work at his new job. That evening Mr. Genberg called the respondent and informed him that the superintendent was "very upset" that he was not at his post in the Dumont school. Mr. Genberg informed the respondent further that the superintendent would "come after" him if he learned the respondent was working in another school. From September 29, 1987, the respondent continued to work at his new job, never returning to the Dumont school. The respondent did not contact the superintendent during this time. Instead the respondent called Eugene White, principal at his new school, and gave Mr. Genberg's telephone number to Mr. White.

I **FIND** that the respondent continued to remain away from his class knowing that a suitable replacement had not been employed.

IV. Eugene M. White's testimony

Eugene M. White, the principal of the James A. Farley Middle School in New York, testified, and based upon his testimony, I **FIND** the following **FACTS**:

On September 3, 1987, Mr. White offered respondent a teaching position in his school. The starting date was "left open," depending upon when the respondent could leave his position with the Dumont school. I therefore **FIND** that the respondent was under no time constraint and under no pressure to leave the Dumont school post prematurely as he did.

Mr. White contacted Mr. Genberg to coordinate the transition; however, Mr. Genberg could give no date for the respondent's release. Mr. White promised to have Anthony Mello, an official from his school, follow up and contact the Dumont School superintendent later. However, Mr. Mello was not able to do so.

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On September 24, 1987, the respondent notified Mr. White that he would begin his new position on September 28, 1987. On the evening of September 28, 1987, Mr. White telephoned Mr. Genberg after speaking to the respondent. Mr. White learned that the Board's superintendent was "angry" about the respondent's failure to remain at his post in the Dumont school. Mr. Genberg also reminded Mr. White that no one from his school had followed up and contacted the superintendent.

On September 30, 1987, Mr. Genberg telephoned Mr. White to update him on the situation. During this conversation, Mr. White claimed that Mr. Genberg told him "everything seemed to be ok" and there would be no actions taken against the respondent because "someone had been hired to fill his position." Even if Mr. Genberg had said such a thing, however, he had no authority to do so. Further, I **FIND** that at the time Mr. Genberg made the alleged statement, the respondent had already set his course and abandoned his class. Giving the respondent the benefit of the doubt, the most that could be said was that he might have returned to his job if Mr. White had relayed to respondent a message that he was needed in the Dumont system. However, those are not facts here.

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

N.J.S.A. 18A:28-8 was enacted for the protection of the local board of education and the public, not for the benefit of the teacher. Evaul v. Camden Bd. of Education, 65 N.J. Super. 68, 76 (1961); rev'd on other grounds, 35 N.J. 244 (App. Div. 1961). That statute provides:

> Any teaching staff member, under tenure of service, desiring to relinquish his position shall give the employing board of education at least 60 days written notice of his intention, unless the board shall approve of a release on shorter notice and if he fails to give such notice he shall be deemed guilty of unprofessional conduct and the commissioner may suspend his certificate for not more than one year.

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I **CONCLUDE** that the respondent violated the letter and intent of the statute, resulting in disruption of his eighth grade class. He must be deemed guilty of unprofessional conduct and he has subjected himself to the possibility of suspension up to a year.

Obviously, the legislature considers this behavior to be serious, since it has provided the rather significant repercussion of a year's suspension for the violation.

This respondent abandoned his position at a time when he knew no replacement had been obtained. He knew that Mrs. Castino was not yet available because no one had been hired for her language class. This replacement came only about a week after the respondent's departure, but it could have taken much longer, with more disruptive effects on the respondent's eighth grade children. On the other hand, it is also possible that the respondent might have returned to his class if he had learned that the replacement process was continuing beyond October 2, 1987. As it was, the disruption was not terribly significant.

The respondent has been described as having been a very good teacher, and in the four years he served the Board no disciplinary actions were necessary against him. This, combined with the absence of any lengthy disruption, leads me to **CONCLUDE** that a six-month suspension of his New Jersey certification is adequate as an exemplary measure.

ORDER

I **ORDER** that the respondent's teacher's certificate be suspended for a period of six months beginning on June 1, 1988, and I **ORDER** that the respondent cease any employment that requires the possession of said certificate.

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This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **SAUL COOPERMAN** for consideration.

3/30/88
DATE

JOHN R. TASSINI, ALJ

Receipt Acknowledged:

April 5, 1988
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

APR 5 1988
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

amr/e

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IN THE MATTER OF THE SUSPENSION	:	
OF THE TEACHING CERTIFICATE OF	:	
ANDREW ZWEIG, SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE BOROUGH OF DUMONT, BERGEN	:	DECISION
COUNTY.	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law.

It is observed that no exceptions to the findings, conclusions and recommendations in the initial decision were filed with the Commissioner by the parties pursuant to the applicable provisions of N.J.A.C. 1:1-18.4. In view of the above and upon review of the record, the Commissioner adopts as his own those findings and conclusions set forth in the initial decision.

The Commissioner, however, does not concur with the penalty recommended by the ALJ which would limit the suspension of respondent's teaching certificate for a period of less than one year.

The record of this matter clearly reveals that the Board had determined that it would accept respondent's resignation from employment as of November 2, 1987, or an earlier date in the event that a suitable replacement could be employed. The record further reveals that respondent unilaterally terminated his teaching employment with the Board on September 27, 1987 with full knowledge of the fact that the Board had not formally acted upon a suitable replacement for his teaching position.

Consequently, the facts establish that respondent did indeed abandon his teaching position with the Board prematurely without authorization and, thereafter, on September 28, 1987 commenced employment in another school district outside the State.

While the Commissioner can appreciate respondent's attempt to seek a more financially attractive teaching position closer to his home, nevertheless he cannot condone respondent's arbitrary determination in abdicating his responsibilities to the pupils he taught in the Dumont School District. Moreover, respondent cannot be excused for the manner in which he suddenly left the Board's employ especially when the Board was attempting to accommodate his request for early release from its employ.

The principle enunciated by the Court in Bates v. Board of Education, 72 P. 907 (Calif. Sup. Ct. 1903), quoted with approval in McGrath v. Burkhard, 280 P. 2d 864 (Calif. App. 1955), and relied

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upon by the Commissioner in Clinton F. Smith et al. v. Board of Education of Paramus et al., 1968 S.L.D. 62 bears repeating herein:

> 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. (at p. 67)

For all of the foregoing reasons the Commissioner finds and determines that petitioner is guilty of violating the provisions of N.J.S.A. 18A:28-8 by illegally terminating his employment relationship with the Board of Education of Dumont.

It is therefore determined that respondent's teaching certificate shall be suspended for a period of one year from the date of this decision.

It is further directed that a copy of this decision be filed with the State Board of Examiners for the purpose of providing the necessary notification to school authorities in other states thereby informing said authorities of the action taken by the Commissioner herein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

May 16, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5162-87
(EDU 6025-86 ON REMAND)
AGENCY DKT. NO. 306-9/86

LOUISE KOVACH,
Petitioner,
v.
BOARD OF EDUCATION OF
THE BOROUGH OF FREEHOLD,
Respondent.

Stephen B. Hunter, Esq., for petitioner (Klausner, Hunter & Oxfeld, attorneys)

Vincent C. DeMaio, Esq., for respondent (DeMaio & DeMaio, attorneys)

Record Closed: February 2, 1988 Decided: March 30, 1988

BEFORE RICHARD J. MURPHY, ALJ:

This matter was remanded by the Commissioner of Education on July 28, 1987, to give the parties an opportunity to argue the legal question of precisely when the petitioner's employment for the 1983-84 school year commenced and its impact on the issue of tenure acquisition. My initial decision of June 10, 1987, had assumed, based on a stipulation filed by the parties, that the school year had started prior to September 6, 1983, the effective date of an amendment to N.J.A.C. 6:28-2.4 (now N.J.A.C. 6:28-4.2(b)3iii), which required petitioner to be certified as a teacher of the handicapped. The Board moved to reopen, arguing the school year opened on September 6, 1983, and that the petitioner therefore did not acquire tenure because she did not satisfy the new certification requirements that went into effect on that date.

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A day of hearing was held in Freehold on November 30, 1987, and briefs were subsequently filed, with the petitioner filing on January 12, 1988, and respondent Board replying on January 25. Petitioner's reply brief was received on February 2, 1988, and the record closed on that date.[1]

FACTS

The facts, as established by testimony at the hearing and documents admitted, are not in dispute. On June 23, 1983, the Board of Education of the Borough of Freehold, at a special meeting, voted to reemploy a number of nontenured professional staff members, including Louise Kovach, for the 1983-84 school year (P-2). An employment contract executed by Kovach and the Board established the period of employment as September 1, 1983 through June 30, 1984 (P-3b).[2] The school calendar distributed by the Board, subject to its right to make changes, scheduled in-service sessions for the professional staff on Tuesday and Wednesday, September 6 and 7, and stated that schools would be opened for students on Monday, September 12 (P-5). The superintendent of schools advised staff members by letter on August 24, 1983, that "[y]our school is now open for your convenience and you are invited to use the facilities any weekday from 8:00 a.m. to 4:00 p.m." (P-4). He also directed all staff to report to respective school buildings on Tuesday, September 6, where they were to meet with principals at 8:05 a.m., to be followed by two days of in-service meetings and activities.

The petitioner testified that she was happy to receive the notice of August 24 that the school was opened for her use and stated that she came to school prior to the in-service session on September 6 to prepare her classroom, as was her annual practice. She was not directed to do so by the superintendent, but felt that this preparation time was necessary in order to complete various preparatory tasks such as decoration of bulletin boards, moving furniture, preparation of a lending library, and similar matters. She estimated that this preparation work consumed some five days. Two hours were set aside on September 7, between 1:00 and 3:00 p.m., for teachers to prepare classrooms for the

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[1] The 45-day due date was extended from March 18 until March 30 because of the administrative law judge's illness.

[2] P-3b is actually a contract from the 1980-81 school year, but the parties stipulated that the terms of the 1983-84 contract were the same.

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first day of school, but the petitioner felt that this was not sufficient. School Principal Steve Fazekas acknowledged that some teachers returned five to ten days before the in-service session on September 6 to prepare their classrooms for the arrival of students on September 12. He also stated that a custodial staff conducted cleaning and maintenance of all classrooms during the summer months.

There is no dispute as to the facts, and I so FIND.

ISSUE

The Commissioner of Education, in remanding this matter, stated the issue in the following manner:

> Upon review of the record, including the document containing the stipulation of facts, the Commissioner finds sufficient basis to grant the Motion to Reopen for the specific purpose of providing the parties with an opportunity to argue the legal question of precisely when petitioner's employment for the 1983-84 school year commenced and its impact upon the issue of her tenure acquisition. Thus, the matter is remanded to the Office of Administrative Law for the sole purpose of rendering a legal determination of tenure acquisition based on the precise date petitioner commenced employment for a 1983-84 vis-a-vis the effective date of N.J.A.C. 6:28-2.4(e) which was September 6, 1983. (Decision at 9 and 10.) (Emphasis added.)

ARGUMENTS OF THE PARTIES

Petitioner argues, first, that she acquired tenure under N.J.S.A. 18A:28-5(b) in that she was employed for three consecutive academic years, together with employment at the beginning of the next succeeding academic year on September 1, 1983, the date her employment commenced under her contract. Specifically, petitioner contends that she was continuously employed throughout July and August of 1983, as a result of the Board's reappointment of her on June 20, 1983, and that, under the decision by the Supreme Court in Canfield v. Board of Education of Pinehill Borough, 51 N.J. 400 (1968), she acquired tenure when she was rehired by the Board for the 1983-84 school year. As a second point, petitioner emphasizes that she was treated as an employee by the Board after June 30, 1983 and before September 6, 1983, and was not eligible for unemployment benefits during this period. A third point urged by Kovach is that her performance of professional

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teaching duties during the month of August 1983 and the first five days of September 1983, conclusively establish that she performed professional teaching functions prior to September 6, 1983.

Respondent Board argues that the academic year began on Tuesday, September 6, 1983, and that the petitioner did not acquire tenure because she did not have the certification required by the new regulation effective on that date. Because petitioner did not serve at least one day of the next succeeding academic year beginning on September 6, 1983, when new certification requirements were in effect, the Board argues that she did not acquire tenure under N.J.S.A. 18A:28-5(b) in the Canfield decision. The Board cites N.J.S.A. 18A:1-1 as defining "academic year" as meaning "the time school opens." Petitioner replies that, under N.J.S.A. 18A:27-6, her employment contract specifies that she was to begin employment on September 1, 1983, and that she acquired tenure on that date.

DISCUSSION AND CONCLUSIONS OF LAW

The statute concerning tenure of teaching staff members provides that:

> The services of all teaching staff members including all teachers ... and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect, shall be under tenure ... after employment in such district or by such board for:
>
> (a) Three consecutive calendar years or any shorter period which may be fixed by the employing Board for such purpose; or
>
> (b) three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
>
> (c) the equivalent of more than three academic years within a period of any four consecutive academic years. [N.J.S.A. 18A:28-5(b)] [Emphasis added.]

The statute also provides, as respondent notes, that "academic year means the period between the time school opens in any school district while under any board of

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education after the general summer vacation until the next succeeding summer vacation." N.J.S.A. 18A:1-1. This is a general definitional provision not specifically related to tenure or terms of employment. The statute further provides that employment contracts for teachers shall specify "the date when the person shall begin such employment." N.J.S.A. 18A:27-6(1).

The issue presented by this case is whether the petitioner satisfied the requirement of "employment at the beginning of the next succeeding academic year" under N.J.S.A. 18A:28-5(b). The Canfield case, 51 N.J. 400 (1968), held that mere execution of a teacher's contract of employment to run for a period which would encompass tenure does not give tenure under N.J.S.A. 18A:28-5(a) to a teacher discharged before serving the period fixed by statute. In that case, a teacher was discharged, without proper notice, four days prior to what would have been the end of serving three full academic years required under N.J.S.A. 18A:28-5(a). In upholding the dismissal and concluding that mere execution of the contract did not confer tenure when service was so interrupted, Appellate Division Judge Gaulkin, stated that:

> It seems to me that tenure and contract are two different concepts; tenure is statutory and arises only by passage of the time fixed by the statute, and the discharge of an employee before the passage of the required time bars tenure, even if the tenure is in breach of an employment contract which, if not breached, would have extended to a date which would have given tenure. [97 N.J. Super. 483, 490 (App. Div. 1967).].

There was no such discharge in this case, but the respondent Board argues that the change in certification requirements effective September 6, deprived the petitioner of tenure because she did not have a proper certificate in full force and effect at the opening of the school year on that date.

I disagree with respondent's analysis. Under the Tenure Act, a teacher with proper certification acquires tenure after employment in a school district for (a) three consecutive calendar years or for a shorter period fixed by the Board; (b) three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or (c) the equivalent of more than three academic years within a period of four consecutive academic years. N.J.S.A. 18A:28-5. Petitioner seeks tenure under section (b). She claims that, by virtue of her contract of employment and services

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performed she had employment at the beginning of the 1983 academic year. The Canfield case concerned section (n), N.J.S.A. 18A:28-5, and there the court held that a teacher who had been terminated (even in violation of contract) before serving the full three consecutive calendar year period was not entitled to tenure and, further, that tenure was not established by execution of a contract without the fulfillment of the terms of that contract by actual teaching service. Because it deals with a different section of the Tenure Act, Canfield does not squarely address the issue posed by this case, which involves the meaning of the term "employment at the beginning of the next succeeding academic year."

Respondent argues that the phrase "academic year" in N.J.S.A. 18A:28-5 is defined as the period between the time a school opens until it closes under N.J.S.A. 18A:1-1. Although, the term "academic year" is so generally defined under the education law, I do not think that this reading of the statute gives sufficient weight to the term "employment" in N.J.S.A. 18A:28-5(b), or to the overall purpose of the Tenure Act to establish a three-year period of teaching employment after which tenure is acquired. The intent of the Tenure Act is to provide security for teachers who have taught for three calendar or academic years, with employment secured by contract at the beginning of the fourth year. The phrase "employment at the beginning of the next succeeding academic year" refers to the contract of employment which establishes the date when the teacher shall begin employment pursuant to N.J.S.A. 18A:27-6(1). The proper point of reference for calculating the period of service is therefore that specified in the employment contract which fixes the teacher's academic year, and not the actual date on which school opens for students, which may be changed at the Board's discretion and thus may vary from year to year. See, N.J.S.A. 18A:36-2; Attorney General's Formal Opinion of 1975, no. 19 (establishing minimum school year of 180 days).

Petitioner's initial employment contract specified that she was engaged and employed to teach in the public schools of Freehold, under the control of the Board of Education, from the first of September 1980 until the 30th day of June 1981. As of September 1, 1983, the starting date for her fourth academic year of employment, petitioner had taught for three years in the Borough of Freehold. On the first of September of each year from 1980 until 1983, she was subject by contract to the direction of the Board of Education as to the discharge of her teaching duties. Under that contract, the Board could have required petitioner to report to school in any of those years on the

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first of September and commence all of her contractually specified teaching duties. The fact that the Board did not require the petitioner to report to school until September 6, 1983 for in-service training does not negate the fact that she was under contract and subject to the performance of her duties as of September 1, 1983, and the previous years. The Board opened the schools as of August 24 to allow teachers to prepare for classes and the petitioner, on the invitation of the superintendent, came into school for several days prior to September 6 to ready her classroom for her students. Even though she was not directed to report until September 6, her performance of duties prior to that date was pursuant to contract and within the period of employment established by that agreement between the parties. Petitioner further testified, without contradiction, that she has come into school each year of her contract prior to the actual day on which the school is open for students. Even if the petitioner had not come into school prior to September 6 to prepare, her employment contract for the 1983 year which ran from September 1 until June 30 established that she had employment at the beginning of the 1983 academic year within the meaning of N.J.S.A. 18A:28-5(b). I **CONCLUDE** for the reasons described above that petitioner acquired tenure on the first day of September of 1983.

ORDER

On the basis of the above findings of fact and conclusions of law, it is **ORDERED** that the petition of Louise Kovach seeking tenure is **GRANTED**.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby FILE my Initial Decision with SAUL COOPERMAN for consideration.

MAY 30, 1988
DATE

RICHARD J. MURPHY, ALJ

APR 5 1988
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

APR 5 1988
DATE

Mailed To Parties:

OFFICE OF ADMINISTRATIVE LAW

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LOUISE KOVACH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FREEHOLD, MONMOUTH COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record and initial decision on remand rendered by the Office of Administrative Law have been reviewed. The Board's exceptions and petitioner's reply thereto were timely filed pursuant to N.J.A.C. 1:1-18.4.

The Board excepts to the ALJ's interpretation and non-application of N.J.S.A. 18A:1-1, the definition of academic year vis-a-vis N.J.S.A. 18A:28-5(b), the provision for tenure acquisition after three consecutive academic years of employment together with employment at the beginning of the next succeeding academic year. It also excepts to his analysis, interpretation, and application of Canfield, supra, arguing that the ALJ reached a legal conclusion of tenure acquisition based upon a contract rather than actual service which is inconsistent with that decision's ruling that tenure and contract are two different concepts.

More specifically, the Board contends that September 1, 1983 is an irrelevant date under the statutory provisions embodied in the above-cited statutes and that the ALJ's use of it is a fatal flaw to the logic of the decision. As to this it states:

> How did the Administrative Law Judge seize upon September 1 as the tenure acquisition date? The analysis appears to be in the first full paragraph on page 6 of the Initial Decision.
>
> The argument begins with a concession that the term academic year is generally defined under education law in accordance with N.J.S.A. 18A:1-1. Immediately thereafter, however, he argues that because the word "employment" is used in N.J.S.A. 18A:28-5(b) that academic year really means contract year. For example, he writes:
>
> > The intent of the Tenure Act is to provide security for teachers who have taught for three calendar or academic years, with employment secured by contract at the beginning of the fourth year. The phrase 'employment at the

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> beginning of the next succeeding academic year' refers to the contract of employment which establishes the date when the teacher shall begin employment pursuant to N.J.S.A. 18A:27-6(1). (Emphasis added)

It is respectfully submitted that this is a quantum leap which is not justifiable by either logic or the words used by the legislature.

The term "contract year" is not uncommon; the concept is clearly understood and readily identifiable. Yet the legislature chose not to use it. Rather the legislature chose to use the term academic year in the specific context of tenure acquisition. A term specifically defined in a way which the Administrative Law Judge concedes accords with general understanding.

In effect the Administrative Law Judge's decision has amended the statute to read that a teaching staff member who is properly certificated achieves tenure by being employed for three academic years and by being employed for the beginning of the next succeeding academic year. If that interpretation be adopted Petitioner would have acquired tenure in June.

The decision can also be read as amending the statute to confer tenure after being employed for three contract years and by being employed at the next succeeding contract year.

Either interpretation is an unwarranted usurpation of legislative authority which does violence to clear and unequivocal statutory language and must be rejected.

The administrative amendment of the statute by the Administrative Law Judge has sought to avoid the impact of Canfield by accelerating the date on which tenure is acquired.

Canfield stands for the proposition that mere execution of a teacher's contract of employment to run for a period which would encompass tenure does not automatically confer tenure. In Canfield the period was terminated by a discharge without proper notice. Notwithstanding the apparent breach of contract the Supreme Court adopted Judge Gaulkin's reasoning that the discharge prevented the acquisition of tenure because "tenure and contract are two different concepts." (Canfield, supra, p. 490)

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It is Respondent's position that the statutory acquisition date was September 6, the beginning of the next successive academic year.

Even though Petitioner had a contract which encompassed that date, she did not acquire tenure because the intervention of the new certification requirement was even more effective than a discharge would have been to prevent tenure status.

Based upon Canfield there is no doubt that Petitioner's failure to have appropriate certification on September 6 prevented her from acquiring tenure notwithstanding her June 20 reemployment. (emphasis in text)

(Board's Exceptions, at pp. 4-6)

Petitioner in her response to the Board's exceptions avers, inter alia, that:

Judge Murphy, citing N.J.S.A. 18A:27-6, determined that Petitioner, Louise Kovach, executed an employment contract that covered the period between September 1, 1983 through June 30, 1984, which defined her professional statutory and contractual responsibilities for that time period as a teaching staff member employed by the Freehold Borough Board of Education. Judge Murphy, furthermore, concluded that it was uncontroverted that district teachers within the Freehold Borough School District received notification on or about August 24, 1983 that the schools were opened for the teachers' use to perform professional duties that were required of them in order to prepare for the first day of school for the students within the district. It was furthermore, uncontroverted that Louise Kovach worked during the latter part of August and throughout the first week in September performing numerous professional duties to get her classroom prepared for the 1983-84 school year and to prepare herself for that particular academic year in all respects.

It is respectfully averred that the above-stated findings of facts, which were not excepted to by the Board of Education, are dispositive of the legal issues in this matter.

Notwithstanding the above factual findings, the Board of Education persists in maintaining that Louise Kovach was somehow not employed within the meaning of N.J.S.A. 18A:28-5(b) by the Freehold Borough Board of Education until after the

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effective date of the administrative regulations that changed certification requirements for the position held by Ms. Kovach during the 1982-83 school year, i.e., September 6, 1983.

Essentially, the Board of Education's arguments, as set forth within its letter memorandum, ignore all of the facts in this proceeding which indicate that Louise Kovach was employed for the entirety of the six year period between September 1, 1980 through the date of her illegal termination, effective June 30, 1986. During this six year period of time, Louise Kovach received yearly appointments to teaching positions within the district, as noted in the Board Minutes, and during her last three years in the district was treated as a tenured teaching staff member. At no time during this six year period of time was Louise Kovach ever unemployed. Petitioner continued to receive, during all of the summer months, health insurance coverage, performed professional duties throughout that period of time, and suffered absolutely no break in service as a teacher within the Freehold Borough School District.

To maintain, as the Freehold Borough Board of Education has, that Louise Kovach was somehow not employed for the period between September 1, 1983 through September 6, 1983 is simply sophistry! To maintain this argument, one would have to conclude that Louise Kovach had somehow lost her employment status as a teacher within the Freehold Borough School District for the first six days of the 1983-84 academic year, as defined by the employment contract she executed, through some mysterious, still undefined, action of the Board of Education. (emphasis in text)

(Petitioner's Reply Exceptions, at p. 2)

Upon a thorough and independent review of the record in this matter, the Commissioner agrees with the ALJ's determination that petitioner acquired tenure on September 1, 1983 because that is the proper point of reference for calculating period of service given that September 1 is the date specified in the employment contract fixing the teachers' academic year for 1983-84. That petitioner had access to the school as of August 24, 1983 to fix up her classroom and prepare for the new academic year has no bearing, however.

As to the Board's argument that the ALJ was incorrect in his analysis and conclusion regarding Canfield, supra, the Commissioner disagrees that error was made. While it is true that Canfield stands for the proposition that tenure is acquired based upon service and not by virtue of the contract, this does not mean

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the ALJ misapplied the case. In Canfield the petitioner's contract never became operative because he was terminated prior to reaching that point in his service with the district. Thus, the mere possession of a contract issued for the following school year without his having commenced service under its terms defeated his claim for tenure acquisition. In the instant matter, however, petitioner did not merely have a contract with the district as of September 1, 1983, she actually commenced her employment as of that date.* As pointed out by the ALJ, the Board could have, by terms of the contract, required her to report to school as of that date. The fact that it did not do so does not negate the fact that her service commenced as of September 1, 1983. Looking to the operative date of an employment contract as a guide to determining the date upon which one's service or period of employment commenced was elaborated upon by the New Jersey Supreme Court in Carroll v. State Board of Education, 8 N.J. Misc. 859, 152 A. 339 (1931). Although the decision does not interpret the tenure statute currently in effect, the court's reasoning is nonetheless deemed to be instructive. In that matter, a contract for employment had been executed on July 15, 1926 providing for the petitioner's employment for the term of one year from September 7, 1926. Petitioner argued that her service had commenced as of July 15, 1926 the date the contract was executed thus entitling her to tenure acquisition three years later as of July 15, 1926. The court determined, however, that her service commenced on September 7, 1926 as provided by the terms of the contract and not the earlier date of execution. Thus, in the instant matter, petitioner may appropriately be deemed to have commenced her employment/service with the Board for 1983-84 as of September 1, 1983. Any arguments that she acquired tenure prior to that date (see Initial Decision, ante) are meritless.

Accordingly, the recommended initial decision is adopted for the reasons expressed therein and as clarified above. Consequently, it is ordered that the action of the Board terminating petitioner's employment for 1986-87 be reversed and that she be reinstated to a teaching staff position within the Freehold Borough School District with all back pay emoluments and benefits denied her less mitigation of any monies earned during the period of back pay. It is stressed, however, that given her lack of certification as teacher of the handicapped, she has no entitlement to resume the preschool handicapped assignment. Rather, her entitlement as a tenured teacher extends only to the endorsement she served under, namely nursery endorsement.

COMMISSIONER OF EDUCATION

May 16, 1988

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* The only actual employment contract submitted as an exhibit in this matter was the one from September 1, 1980-June 30, 1981. However, the Board has not disputed the ALJ's finding that petitioner's employment contract commenced September 1, 1983. Rather it disagrees with the ALJ's conclusions of law with respect to that date.

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1383-88
AGENCY DKT. NO. 39-3/88

FRANK X. CLARK, MARUCHY PEREZ,
JAIME MACIAS AND RALPH LANNI,
Petitioners,
v.
BOARD OF EDUCATION OF THE
CITY OF UNION CITY,
Respondent.

William Z. Shulman, Esq., for petitioners

Richard L. Friedman, Esq., for respondent (Giordano, Halleran and Ciesla, attorneys)

Donald Scarinci, Esq., for candidate Abraham Antun (Fischer, Kagan, Zaretsky and Scarinci, attorneys)

Mark J. Nelson, Esq., for candidate Dominick Marchesani (Vaccaro, Osborne, Curran and Murphy, attorneys)

Record Closed: March 21, 1988 Decided: March 30, 1988

BEFORE ARNOLD SAMUELS, ALJ:

This matter was brought on by the filing of a petition with the Commissioner of Education on March 3, 1988, by petitioners Clark, Perez, Macias and Lanni, challenging a drawing for ballot positions conducted on February 16, 1988. The challengers are candidates in the Board of Education election to be held on April 5, 1988.

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PROCEDURAL HISTORY

The Commissioner of Education transmitted the matter to the Office of Administrative Law on March 3, 1988, for argument and decision on an expedited basis. Oral argument was heard on March 7, 1988, and an order was entered on March 11, 1988 denying emergency relief. Said order is incorporated into this record and made a part hereof. A copy of the order is attached hereto.

An expedited plenary hearing was held at the Office of Administrative Law in Newark, New Jersey, on March 21, 1988. Testimony was heard from one witness, Libero Marotta, Esq., on behalf of the petitioners. A videotape of the February 16, 1988 drawing for ballot positions was viewed and heard, and a copy was marked in evidence, Exhibit J-1. Argument by counsel was heard and considered, and an oral decision was rendered, on the record, from the bench at the conclusion of the March 21, 1988 proceeding. This initial decision confirms and summarizes the oral decision, which shall remain part of the record.

In addition to the foregoing, all papers filed by the parties and other participants were reviewed and considered. These papers consisted of the motion and petition, with attachments, including a certification by Libero Marotta; an answer to the petition by the Board, containing denials and affirmative defenses together with a brief and certifications by Richard DeLaRoche, Jose Fuentes and Richard Mohr; a supplemental brief by respondent Board of Education with exhibits attached, plus a certification from Richard L. Friedman, Esq. and Ralph Passante, and a notice of motion for summary judgement, with appropriate attachments; and a motion for dismissal, with attachments, by candidate Dominick Marchesani.

ISSUES

The petitioners have demanded the following relief:

A. To void the drawing for ballot position conducted on February 16, 1988, and to conduct a new drawing.

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B. For an order striking the name of candidate Dominick Marchesani from the ballot.

C. To place the forthcoming election under the supervision of an independent monitor.

DISCUSSION, FACTS AND CONCLUSIONS

A. The application to void the drawing for ballot position and conduct a new drawing.

The applicable statute relating to the drawing for ballot positions in a school election provides,

> Position of names of candidates; drawing of names
>
> a. . . . the drawing shall be done by the secretary or, in the event of his sickness or disability or absence from the district, by a person designated by the president of the board of education. The person making the drawing shall make public announcement at the drawing of each name, the order in which the name is drawn and the term of office for which the drawing is made.
>
> b. A separate drawing shall be made for each full term and for each unexpired term, respectively. The names of the several candidates for whom petitions have been filed for each of the terms shall be written on cards of the same size, substance and thickness. The cards shall be placed in a covered box with an aperture in the top large enough to admit a man's hand and to allow the cards to be drawn therefrom. The box shall be turned and shaken thoroughly to mix the cards and the cards shall be withdrawn one at a time.
>
> N.J.S.A. 18A:14-13.

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Having heard the testimony, reviewed the papers on file and considered the argument of counsel, the following **FACTS** are found:

Petitioners claim that the drawing was improper and illegal because it was conducted by Richard DeLaRoche, who is not the board secretary as required by the statute, but who allegedly was designated by the president of the Board, as required by the statute.

Petitioners claim that improprieties also occurred in the drawing process.

It has been stipulated that it is an advantage for a candidate to be selected to occupy No. 1 position on the ballot, and that higher positions are more advantageous than lower positions.

Two conflicting political factions are involved in this dispute. The first faction, "Alliance," is in control of the Board and the candidates it supports. The second faction, "Save our Schools," are dissidents opposed to the Board and its preferred candidates. There is strong political motivation on both sides.

The person who conducted the drawing, Richard DeLaRoche, Esq., is counsel to the Board of Education and is sympathetic to the political faction supported by the Board.

Mr. DeLaRoche was chosen in advance by the Board president to conduct the drawing because of the Board's confidence in him and his experience in such matters.

The candidate drawn to occupy the first position on the ballot for the three-year term was a person supported by Alliance, the political faction favorable to the Board. Two other Alliance candidates received the fourth and fourteenth positions. The Save Our Schools candidates were drawn in fifth, seventh and eleventh positions. After some candidates withdrew from the election, Alliance candidates occupy the first, second and seventh positions on the ballot, and the three Save Our Schools people are in third, fifth and sixth positions.

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Petitioners claim that an admittedly improper choice of Mr. DeLaRoche as judge of elections, pursuant to N.J.S.A. 18A:14-6, which was subsequently withdrawn, is related to the perceived imperfections in the drawing for ballot position held on February 16, 1988. Mr. DeLaRoche was not qualified to be judge of elections because the statute required that such persons be a resident of the district. The appointment of Mr. DeLaRoche as judge of election, made by the Board on January 25, 1988 and rescinded on February 29, 1988, had no relevant effect on the drawing for ballot positions.

A prior decision of the Office of Administrative Law and the Commissioner of Education, Docket No. EDU 2592-87, decided May 6, 1987 by an administrative law judge, is also irrelevant, although it chastized the controlling political faction, Alliance, for its behavior in the 1987 school board election.

Richard DeLaRoche was selected by the president of the Board of Education approximately one week prior to February 16, 1988 to conduct the drawing for ballot positions in the event of the unavailability of the secretary of the Board.

On February 16, 1988, the secretary of the Board of Education, Richard Mohr, was at work in the Board offices as usual.

Late in the afternoon of that day, Mr. Mohr said he was not feeling well, and he asked Mr. DeLaRoche to conduct the drawing for ballot positions, pursuant to the previous designation by the Board president, because he (Mohr) would not be available that evening. Mr. Mohr left and did not return. When seen by Libero Marotta, Mr. Mohr gave no outward indication of illness, and he did not appear to be sick.

No evidence of illness on the part of Mr. Mohr was presented, other than his statement in a certification prepared for this hearing that he went home early that evening because he was not feeling well.

Mr. DeLaRoche conducted the drawing for ballot positions that evening. The Board secretary was under a "disability," and the statute was complied with in accordance with the prior designation of the president of the Board of Education.

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The substitution of Mr. DeLaRoche for Mr. Mohr was prearranged. However, the statutory requirements were complied with.

It is **CONCLUDED**, by a preponderance of the credible evidence, that the petitioners have not proven the existence of any substantial fraud, impropriety or illegality, despite the fact that the statute was used by the Board in the manner set forth above, in order to enable Mr. DeLaRoche to conduct the drawing in lieu of the Board secretary. The statutory requirements were complied with, and the drawing for ballot positions should not be voided.

Richard DeLaRoche used 3x5 index cards for the drawing on February 16, 1988. All cards were the same size, color, substance and thickness. Each candidate's name was typed in the middle of the card. The cards were laid on the table in full view of those present, including several of the candidates. Mr. DeLaRoche then invited the people present to approach the table, look at the cards and check them. The cards were arranged neatly on the table in two groups, one for the three-year term and one for the one-year term. More than several people accepted Mr. DeLaRoche's invitation, approached the table and looked at the cards. No objection was voiced by anyone. The only prohibition, repeated several times by Mr. DeLaRoche, cautioned that no one was to touch the cards.

Mr. DeLaRoche carefully and openly folded each card twice and dropped it in the ballot box, which was an octagonal rotating drum, similar to those used to select juries in the courts. The candidates and others present watched as each card was folded and dropped into the box. No one objected to the procedure or made any adverse comments, except that one person suggested that capsules should be used instead of cards. (The statute specifically provides for the use of cards, not capsules.)

After all cards were inserted in the ballot box, Mr. DeLaRoche shook it from side to side and spun it before extracting a card. He followed the same procedure until all of the cards were drawn. As each name was drawn, Mr. DeLaRoche read it from the card and handed it to the secretary, noting the ballot position. No one objected to the manner in which the drawing was conducted, which was in full view of all present. As Mr. DeLaRoche drew each card, opened and displayed it, he asked if anyone wanted to see it. No one did.

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Libero Marotta, in his testimony, stated that he does not think each card was folded the same way; that two of them were folded lengthwise first and then across the width, whereas the others were folded in width first and lengthwise second. Mr. Marotta did not voice such an objection during the drawing, but only after he saw the videotape (Exhibit J-1).

In his testimony Mr. Marotta also objected to the fact that people at the drawing were permitted to look at the cards, but not allowed to touch them.

The videotape record of the drawing does not clearly show a variation in the manner used by Mr. DeLaRoche to fold the cards. It also substantiates the fact that no one watching at the drawing objected to any part of the procedure.

It is **CONCLUDED**, by a preponderance of the credible evidence, that the petitioners have not shown that there was anything unfair or improper in the manner in which the drawing was conducted.

B. **The application to strike the name of Dominick Marchesani as a candidate on the ballot.**

The statute outlining the requirements of a nominating petition is as follows:

> Contents of petition.
>
> Each nominating petition shall be addressed to the secretary of the Board of Education of the district and therein shall be set forth:
>
> a. A statement that the signers of the petition are all qualified voters of the school district or, in the case of a regional school district, qualified voters of the constituent district which the candidate shall represent on the board of education of the regional district;
>
> b. The name, residence and post office address of the person endorsed and the office for which he is endorsed;

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c. That the signers of the petition endorse the candidate named in the petition for said office and request that his name be printed on the official ballot to be used at the ensuing election; and

d. That the person so endorsed is legally qualified to be elected to the office.

Accompanying the petition and to be filed therewith, there shall be a certificate signed by the person endorsed in the petition, stating that:

a. He is qualified to be elected to the office for which he is nominated;

b. He consents to stand as a candidate for election; and

c. If elected, he agrees to accept and qualify into said office.

N.J.S.A. 18A:14-10.

Mr. Marotta testified that Dominick Marchesani was a "dummy" candidate, put up by the Alliance party, and that his wife and father were both employed by the Board of Education. Mr. Marotta said that despite this the Board of Education does not really endorse Mr. Marchesani and does not support him. It is claimed that the Marchesani name, which is known in the City, is being used to split votes away from the opposition candidates. Mr. Marotta also stated that the 12 people who signed Mr. Marchesani's petition are employees of the Board of Education, who are actively campaigning for candidates other than Mr. Marchesani.

The statute is clear. People who are politically partisan in one direction or another are not prohibited from signing nominating petitions, and there is no disability on account of their employment.

It is found to be FACT that no evidence was presented that the signatures on Mr. Marchesani's petition were not bona fide or that the petitioners were not the people they represented themselves to be. No evidence of bad faith on behalf of those who signed the

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petition was shown. Impartiality or independence is not a prerequisite for those who sign nominating petitions. The statute was complied with.

In addition, N.J.S.A. 18A:14-12 provides that a nominating petition, not found to be defective as of the 48th day preceding the election, shall be conclusively valid. The 48th day preceding the election was approximately February 18. This challenge was filed on March 3, and it should be barred under the statute. Nevertheless, this decision is based on the merits, rather than to rely on the jurisdictional defect alone.

It is therefore **CONCLUDED** that the petitioners have not proven, by a preponderance of the credible evidence, that the name of Dominick Marchesani should be removed from the ballot because of illegality, fraud or other impropriety, none of which were shown to exist in the nominating petition.

C. **Supervision of the election by an independent authority.**

No evidence or testimony was presented in support of this application. Although it is clear that strongly diverse political partisanship, rather than reference to the best interests of the children, is the driving force behind the efforts of the divisive forces involved in this matter, it is **CONCLUDED** that petitioners have not shown any justification to order that the election be supervised in any manner other than provided for in the controlling statutes, N.J.S.A. 18A:14-1 et seq.

ORDER

It is therefore **ORDERED** that the petition be **DISMISSED.**

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This recommended decision may be adopted, modified, or rejected by SAUL COOPERMAN, COMMISSIONER OF THE DEPARTMENT OF EDUCATION, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days, and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52: 14B-10.

I hereby FILE my Initial Decision with SAUL COOPERMAN for consideration.

March 30, 1988
DATE

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

April 5, 1988
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 5 1988
DATE

OFFICE OF ADMINISTRATIVE LAW

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FRANK X. CLARK ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF UNION CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The Board's exceptions were timely filed pursuant to N.J.A.C. 1:1-18.4.

The Board takes exception to the ALJ's finding of fact on page 6 of the initial decision that "[t]he substitution of Mr. DeLaRoche for Mr. Mohr was prearranged." As to this, it avers that the substitution was prearranged in the event of illness or absence and that, if it is left as it is, the sentence could be read in different ways.

Upon review of the record in this matter and the Board's exceptions, the Commissioner is in agreement with the ALJ's findings, conclusions and recommended decision to dismiss the petition and he adopts them as his own.

While the Board might understandably be hypersensitive to the wording of the finding of fact it objects to above, as well it should given its illegal action of January 25, 1988 appointing Mr. DeLaRoche to conduct and supervise the 1988 election in the Union City School District, the Commissioner finds no reason to alter or delete the wording of the finding. The finding itself is the last of numerous findings of fact running for two full pages in the initial decision. A reading of the entirety of the findings of fact achieves the results desired by the Board, particularly in light of the finding which states, "Richard DeLaRoche was selected by the president of the Board of Education approximately one week prior to February 16, 1988 to conduct the drawing for ballot positions in the event of the unavailability of the secretary of the Board." (emphasis supplied)

While it is emphasized that no illegality was demonstrated in this matter regarding the substitution of Mr. DeLaRoche to draw the ballot positions given that no evidence was presented to discredit the Board secretary's sworn statement that he became ill the evening of that activity, the Commissioner cannot help but comment that it is not unreasonable or frivolous that a challenge arose with respect to the "fortuitousness" or coincidental timing of such illness given the Board's obvious preference for Mr. DeLaRoche to conduct and supervise the election. Moreover, the Commissioner feels obligated to point out that this petition appears to be yet

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another example of the on-going struggle between the competing coalitions involved in Union City Board of Education elections, a struggle which smacks of and thinly hides the partisan politics that are at play in such elections which is not in keeping with and is inimical to the letter and spirit of the law prohibiting partisan politics in school elections. N.J.S.A. 18A:14-1

Consequently, the Commissioner yet again reminds the Board and all other coalitions of candidates seeking control of the Board of the Appellate Division's words in Botkin v. Westwood, 52 N.J. Super. 416 (App. Div. 1958) which state:

> ***The aim is clear that the local school system shall be run by the citizens through their elected representatives on the board of education and not by political parties and that the elections of board members shall be on the basis of educational issues and not partisan considerations.*** (emphasis supplied) (at 431).

Accordingly, the Petition of Appeal is dismissed with prejudice for the reasons stated in the initial decision.

COMMISSIONER OF EDUCATION

May 17, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6895-87
AGENCY DKT. NO. 289-9/87

SAM AYOUB,
Petitioner,
v.
SOUTH PLAINFIELD BOROUGH BOARD OF EDUCATION,
Respondent.

Stephen E. Klausner, Esq., for petitioner (Klausner, Hunter & Oxfeld, attorneys)

Robert J. Cirafesi, Esq., for respondent (Wilentz, Goldman & Spitzer, attorneys)

Record Closed: February 25, 1988 Decided: April 8, 1988

BEFORE **DANIEL B. MC KEOWN**, ALJ:

Sam Ayoub (petitioner), employed as a teaching staff member by the South Plainfield Borough Board of Education (Board), alleges that the Board allowed the high school principal to transfer him to a teaching position for the 1987-88 academic year without an authorizing resolution from it and without a reduction in force, in violation of his tenure status in the Board's employ as a cooperative industrial education coordinator. The Board denies petitioner acquired tenure as a cooperative industrial education coordinator and, alternatively, contends that even if he has tenure as a coordinator his assignment for 1987-88 is not in violation of such rights. The Commissioner of Education transferred the matter on October 15, 1987 to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq. A prehearing conference was conducted in the matter December 21, 1987 and the matter was set for hearing to occur February 5, 1988. Prior to the commencement of hearing, the parties advised that

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they arrived at a joint stipulation of fact and would cross move for summary decision in their favor. The record closed on the parties' cross motion for summary decision February 25, 1988. The record consists of the pleadings, stipulation of fact as amended, a certification in lieu of affidavit from the high school principal attached to the Board's brief, and petitioner's brief in support of his motion for summary decision.

STIPULATION OF FACT

The parties stipulate the following facts. It is noted that stipulation of fact No. 9 was amended by consent of the parties. Stipulation of fact No. 9 reproduced below is as amended.

1. That as of June 1, 1987, Petitioner held the position of Teacher of Industrial Education, and the title of Coordinator of Cooperative Industrial Education ("CIE") at the South Plainfield High School, in accordance with the job descriptions of Teacher and Coordinator-Cooperative Industrial Education I which are attached as Exhibits "A" and "B" respectively.

2. That Petitioner had held the position of Teacher since 1956; had held the position of Teacher of Industrial Arts since 1966; and had worked as CIE Coordinator since 1972.

3. That as of June 1, 1987 Petitioner held the Certifications shown as Exhibit "C" hereto.

4. That Petitioner received his Permanent Teacher Certification in Industrial Arts in 1970, and his Certification as CIE Coordinator in 1972.

5. That Petitioner is a tenured teaching staff member in the employ of Respondent.

6. That during the month of June 1987 Petitioner was notified by the Principal of the High School that he would not be assigned as CIE Coordinator effective with the 1987-88 school year, but would be assigned as Teacher of Industrial Arts.

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7. That no Resolution of the Respondent Board was adopted with regard to Petitioner's change of assignment.

8. That Petitioner's pay scale was not altered by the change of assignment.

9. That Petitioner's prior annual assignment to the position of CIE Coordinator was not made pursuant to a Resolution of the Respondent Board each year, but was pursuant to a letter to Petitioner each year from the Assistant Superintendent of Personnel. The only exception is that Petitioner received a special service contract for the summers of 1972, 1973 and 1974. The High School Principal has, since 1972, designated certain persons as CIE Coordinators. From 1972 to 1976 there was one such coordinator; from 1976 to 1983, there were two; from 1983 to January 1987 there was one; and from January 1, 1987 there was one; and from January 1, 1987 to June 1, 1987 there were two.

10. That as of June 1, 1987 there were two staff members, one of whom was Petitioner, employed as CIE Coordinators at South Plainfield High School. The other was Deirdre Falato. [See Certification of Leroy E. Seitz attached hereto and incorporated herein as if set forth in full.]

11. That following the reassignments announced to Petitioner in June 1987, there was only one CIE Coordinator at South Plainfield High School, and that position was occupied by Deirdre Falato.

12. Deirdre Falato received her Certification as a CIE Coordinator in 1979. She was hired by Respondent in January, 1987 as a CIE Coordinator.

13. That on the date of the reassignment announced to Petitioner in June 1987 there was only one available teaching staff member at South Plainfield High School who was qualified to teach Power Mechanics, a course offering in Industrial Arts, and that person was Petitioner.

14. That Petitioner's current position as Teacher of Industrial Arts is in accordance with the Job Description attached as Exhibit "A".

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This concludes a recitation of the facts stipulated by the parties. These facts, I FIND, constitute all relevant and material facts necessary for the matter to be adjudicated.

PETITIONER'S ARGUMENT

Petitioner's essential argument is that the Board violated petitioner's tenure rights as a coordinator of the cooperative industrial educational program when it involuntarily transferred him from that position to the position of a teacher of industrial arts. In support of this position, petitioner cites Childs v. Union Twp. Bd. of Ed., 1980 S.L.D. 1134, aff'd St. Bd. 1981 S.L.D. 1404, aff'd N.J. Sup. Ct. App. Div., (unreported) [but as reported at 1982 S.L.D. 1456], Lynch v. Highland Park Bd. of Ed., 1980 S.L.D. 182, Reeves v. Westwood Regional School District, 1980 S.L.D. 702, and, Bierman v. Glen Rock Bd. of Ed., 1980 S.L.D. 809, aff'd St. Bd. 1981 S.L.D. 1391. Petitioner's argument is predicated upon his thesis that he has acquired tenure pursuant to law in the position of coordinator, cooperative industrial education while Deidre Falato has not acquired tenure.

BOARD'S ARGUMENTS

The Board contends that it first employed petitioner in 1956 for assignment to a teaching position from which it has never transferred him. The Board contends that because it never assigned petitioner to the position of coordinator he could therefore not acquire tenure in that position under N.J.S.A. 18A:28-6.

Next, the Board contends because petitioner has not acquired tenure as a coordinator his assignment to teach for 1987-88 is proper. But even if, the Board maintains, petitioner did acquire tenure as a coordinator, his assignment as a teacher during 1987-88 is not in violation of his tenure status under Stegmann v. Union Bd. of Ed., unpublished, N.J. Sup. Ct. App. Div. (Dkt. No. A-4737-79T2, Oct. 7, 1981), rev'g St. Bd. 80:309, cert. den. 89 N.J. 437 (1982). Finally, the Board contends its motion for summary decision must be granted in its favor.

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LEGAL ANALYSIS

A threshold issue which must be resolved is whether petitioner has met the precise conditions articulated in the statute for the acquisition of tenure in the position of coordinator, cooperative industrial education in this Board's employ. Zimmerman v. Bd. of Ed. City of Newark, 38 N.J. 65 (1962). The parties in this case stipulate petitioner acquired a tenure as a teaching staff member in the Board's employ; no such stipulation has been entered regarding petitioner's status as coordinator. It is stipulated petitioner was first appointed by the Board in 1956; therefore, under N.J.S.A. 18A:28-5 a tenure status accrued to petitioner sometime in 1959 as a teacher.

When petitioner began performance as a coordinator, after having acquired tenure as a teacher, and there is no dispute that the position of coordinator, cooperative industrial education, is a tenure eligible position, tenure if acquired by petitioner would accrue to him pursuant to N.J.S.A. 18A:28-6.

While neither side cited the case of Buehler v. Ocean Twp. Bd. of Ed., 1970 S.L.D. 436, aff'd St. Bd. of Ed. 1971 S.L.D. 660, aff'd N.J. Sup. Ct. (App. Div. unpublished) [but see 1972 S.L.D. 664], is instructive for this present dispute. Buehler was initially appointed by the board as a teacher in 1952. Subsequent to that time, the superintendent appointed Buehler, without board authority, to a position as chairman of the social studies department. After three years as chairman of the social studies department, Buehler was notified by the superintendent that his contract as chairman would not be renewed the following year. Buehler claimed he had tenure in his position as chairman and/or supervisor of the social studies department of the Ocean Township high school under N.J.S.A. 18A:28-5 and -6. The Commissioner rejected Buehler's argument and held, in part, as follows:

> The Commissioner, in holding [in Zielinski v. Guttenberg Bd. of Ed., 1970 S.L.D. 202] that the teacher had not acquired tenure because her initial employment did not receive an affirmative action of the Board said:
>
> > "* * * the Commissioner holds that any engagement undertaken by a Superintendent to employ a teacher, without the necessary affirmative action by the employing board in accordance with the statutes, cannot constitute employment within the meaning of the tenure law. * * *

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In the instant matter, petitioner was assigned supervisory duties by another school official, a principal, but there was no affirmative act of the Board to make petitioner a supervisor.

In this case, there is no doubt that petitioner was not appointed coordinator, cooperative industrial education by the Board for any period of time which is creditable towards the acquisition of tenure. Therefore, petitioner cannot now claim the legislative status of tenure as coordinator because he simply cannot meet the precise conditions articulated in the statute for the acquisition of tenure in that position.

While I must **FIND** and **CONCLUDE** that petitioner's claim to have acquired tenure in the employ of this Board as coordinator must fall, this Board is well advised to review informal appointments to various tenure eligible positions being made by its administrators. There is no allegation in this case that this Board acted in bad faith by endorsing, in silence, its administrator's conduct regarding other informal appointments so as to avoid the consequences of tenure attaching to the appointees. Nevertheless, should informal appointments continue this Board shall be faced with needless litigation expenses.

Having found and concluded that petitioner is not entitled to the status of tenure in the position of coordinator, his assignment as teacher for 1987-88 must in all respects be affirmed. The remaining arguments advance by petitioner therefore are rendered moot. Petitioner did not establish he has acquired tenure as coordinator. Petitioner has advanced no basis for relief to be afforded him. Therefore, the petition of appeal is **DISMISSED.**

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This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

April 8, 1988
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

4/11/88
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

APR 13 1988
DATE

Mailed To Parties:
OFFICE OF ADMINISTRATIVE LAW

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SAM AYOUB,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH PLAINFIELD, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner's exceptions were timely filed pursuant to N.J.A.C. 1:1-18.4.

Petitioner strenuously objects to the finding and conclusion of the ALJ that he did not acquire tenure as CIE Coordinator because the Board did not act to appoint him to that position. Pointing to the fact that he served as CIE Coordinator for 15 years, he argues that it is preposterous to suggest that the Board had no knowledge of this fact, averring that hundreds of documents were submitted directly to the Board which clearly indicated he was CIE Coordinator including, at the very least, observations, evaluations, and mileage reimbursement requests. As such, petitioner contends that the Board must either be estopped from asserting that it did not authorize the transfer to CIE Coordinator or it waived its right to assert that it did not formally transfer him.

Petitioner contends that the ALJ has ignored the fact that the Commissioner has consistently monitored boards of education to prevent tenure avoidance devices, citing as support the following passage from Boeshore v. North Bergen Board of Education, 1974 S.L.D. 805, 814 citing Quinlan v. Bd. of Ed. of No. Bergen, 1959-60 S.L.D. 113 which states:

> ***The Commissioner must be vigilant to protect those who are entitled to tenure from the erosion of their tenure rights by subterfuge and evasion. He must be equally vigilant against the employment of devices to confer tenure upon those who are not entitled to its protection. The duties performed rather than the title of a position must be controlling in determining whether a position is protected by tenure. Nomenclatures may not be the deciding factor. (emphasis supplied)

Moreover, petitioner urges that Pallarino v. Livingston Board of Education, decided by the Commissioner June 19, 1987, is

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supportive of his position, in particular those portions which read:

> Some time during the 1982 summer Dr. Bornstein, with apparent authority of the Board and the superintendent, offered petitioner employment as a supplemental teacher on behalf of the Board with the Livingston school district. Petitioner accepted such offered employment. Petitioner performed duties as a supplemental teacher for the Board between at least September 7, 1982 through September 28, 1982. At all times relevant, petitioner was in possession of proper and appropriate teacher certification for the assignment as a supplemental teacher. Petitioner submitted pay vouchers as a supplemental teacher and was paid by the Board for services rendered as a supplemental teacher during this period of time. Petitioner was not enrolled as a member of the Teachers' Pension and Annuity Fund during 1982-83.
>
> ***
>
> ***Dr. Bornstein, having the implied delegated authority from the Board to employ [a] supplemental teacher, reasoned that he would secure the services of petitioner full time in order to address that need because petitioner is a fully certificated teacher. Without discussing with petitioner her changed duties between being a supplemental teacher and an asserted aide, Dr. Bornstein knew that petitioner would continue to be a supplemental teacher. The fact that petitioner's pay vouchers between October 1982 through June 30, 1983 state she was being paid as an aide does not translate into a finding that petitioner's assigned duties were duties as an aide. Obviously, Dr. Bornstein arranged that method of payment in order to justify petitioner's full time work at the Riker Hill resource room. The Board, having delegated authority to Dr. Bornstein to engage teachers, cannot now escape the responsibility surrounding Dr. Bornstein's actions. The Board is imputed to have knowledge of Dr. Bornstein's conduct surrounding this matter and his efforts to secure the full time services of petitioner as a supplemental teacher while paying her as an aide. This arrangement is the kind of subterfuge and evasion to deny teachers the statutory benefit of tenure which the Commissioner has condemned on prior occasions.
>
> (Slip Opinion, at pp. 15-18)

Upon a thorough, independent review of the record in this matter, the Commissioner rejects the recommended decision of the ALJ based upon the following.

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Teaching staff members who work in positions for which a certificate is required, who hold a valid certificate for the position and who have worked the requisite period of years are eligible for tenure. Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63, 81. Petitioner in the instant matter worked in the position of CIE Coordinator for which an educational services certificate is required (N.J.A.C. 6:11-12.3); he possessed said certificate; and he served in that position for 15 years, a period well beyond the requisite period of time for tenure acquisition. N.J.S.A. 18A:28-5, 6. Thus, tenure in that position has long since been acquired.

As explained by the State Board in Capodilupo v. Bd. of Ed. of the Town of West Orange, decided by the Commissioner May 3, 1985, aff'd/rev'd State Board September 3, 1986, aff'd N.J. Superior Court, Appellate Division July 2, 1987, tenure is achieved in a particular position and the scope of the position to which tenure protection attaches is limited by the scope of the certificate that the teaching staff member must hold. Because the position of CIE Coordinator requires an educational services certificate, it is a separately tenurable position from that of teacher. Thus, petitioner could not be removed from that CIE Coordinator position absent a reduction in force, dismissal by tenure charges, or a transfer with his consent as supported by the decisions in Madeline Childs v. Bd. of Ed. of Township of Union, 1980 S.L.D. 1134, aff'd State Board 1981 S.L.D. 1404, aff'd N.J. Superior Court, Appellate Division, 1982 S.L.D. 1456; Wilma Colella v. Bd. of Ed. of Elmwood Park, 1983 S.L.D. 149, aff'd State Board 172, aff'd N.J. Superior Court, Appellate Division, 1984 S.L.D. _____ (July 19, 1984); Capodilupo, supra; Melillo v. Bd. of Ed. of the Essex County Vocational School District, decided by the Commissioner July 2, 1987, aff'd State Board December 2, 1987. See also Howley and Bookholdt v. Bd. of Ed. of Ewing, 1982 S.L.D. 1328, aff'd State Board 1983 S.L.D. 1554.

In light of the above case law, the Commissioner rejects the Board's argument that even if petitioner were tenured as CIE Coordinator, a reassignment to full-time duties as teacher was appropriate based on Stegemann v. Bd. of Ed. of the Township of Union, 1980 S.L.D. 303, aff'd State Board 309, rev'd N.J. Superior Court, Appellate Division, 1981 S.L.D. 1499, cert. den. 89 N.J. 437 (1982). The Appellate Court in Childs, supra, expressly disagreed with the court's decision in Stegemann and since that time the Commissioner, State Board and the courts have consistently relied upon Childs as appropriate law on the issue.

As to the fact that petitioner's assignment as CIE Coordinator was not effectuated by Board resolution, the Commissioner disagrees with the ALJ that tenure acquisition is thus precluded. As repeatedly stated in case law, tenure is a legislative protection which the Commissioner must vigilantly and assiduously guard from erosion, evasion or subterfuge. That the Board in this matter for 15 years impermissibly abdicated or delegated its power to name the district's CIE Coordinator(s) to the high school principal (with notification thereof from the assistant superintendent) cannot be used as an excuse to prevent petitioner's

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tenure acquisition, given that he has served in the position for the requisite period of time under a valid certificate required of the position. Spiewak, supra Thus, the Commissioner is unpersuaded that Buehler, supra, should be controlling in this matter, particularly in light of the fact that the Commissioner's holding in that matter relied on his determination in Zielenski v. Bd. of Ed. of Guttenberg, 1970 S.L.D. 202, rev'd State Board 1971 S.L.D. 664, aff'd N.J. Superior Court, Appellate Division, 1972 S.L.D. 692. (See Initial Decision, ante.) This determination was subsequently reversed by the State Board as explained by its words below:

> ***[T]he Commissioner also held that [Zielenski's] employment did not come about by "a recorded roll call majority vote of the full membership of the board" as prescribed in N.J.S.A. 18A:27-1. Since the tenure statute, in describing the periods of service for purposes of tenure, uses the phrase, "***after employment in such district or by such board," one must conclude that the Legislature recognized a difference between an employment in a district as distinguished from an employment by a board. An almost identical distinction is recited in N.J.S.A. 18A:28-4:
>
> > No teaching staff member shall acquire tenure in any position in the public schools in any school district or under any board of education, who is not the holder of an appropriate certificate for such position***.
>
> These statutes lead us to conclude that it was not intended to deny tenure to a teacher, otherwise eligible, who taught continuously and performed all the duties of a regular teacher because the formality of a roll call vote may not have been undertaken where, as here, the Board had full knowledge of the details of petitioner's employment, assignment and benefits, and where the actions of its Superintendent were ratified and concurred in by the Board.*** (at 668)

Accordingly, for the reasons stated herein, it is determined that petitioner's removal from his tenured CIE Coordinator position was improper. It is ordered, therefore, that he be reinstated forthwith to such position.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

May 24, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7941-87
AGENCY DKT. NO. 337-11/87

DAVID C. DREIFUSS,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF CHATHAM, MORRIS COUNTY,
Respondent.

David C. Dreifuss, pro se

Gilbert E. Owren, Esq., for respondent
(Drummond & Owren, attorneys)

Record Closed: February 29, 1988 Decided: April 13, 1988

BEFORE **EDITH KLINGER**, ALJ:

This matter was opened by petition before the Commissioner of Education of New Jersey on November 10, 1987. An answer was filed by respondent on November 30, 1987, and on December 2, 1987, the matter was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A.

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52:14F-1 et seq. After notice, a prehearing conference was held on January 12, 1987, at which it was agreed, among other things, that the following issues were to be heard:

1. Whether respondent was obliged to provide pupil transportation to petitioner's daughter under N.J.A.C. 6:21-1.3(a).

2. Whether N.J.A.C. 6:21-1.3(b) requires measurement of the distance between home and school from the entrance of the pupil's home.

3. What is the distance from pupil's home to school, measured according to N.J.A.C. 6:21-1.3(b)?

At the request of the Administrative Law Judge, George A. Snow, County Superintendent of Morris County, provided assistance to the parties by offering the services of a member of his staff to conduct an independent measurement of the distance between the Dreifuss home and the school. The parties agreed to stipulate the facts, including the information provided by Superintendent Snow, and proceed to a judgment on the papers. The record closed on February 29, 1988, following the submission of briefs.

STIPULATED FACTS

Katherine Dreifuss attends Southern Boulevard School in Chatham Township, New Jersey, as an elementary student. Southern Boulevard School is within the jurisdiction of the Chatham Township Board of Education. David Dreifuss, the father of Katherine Dreifuss, has requested transportation to and from the Southern Boulevard School for his daughter. The request was denied by the Board on the basis that petitioner resided less than two miles from the school and therefore was not residing "remote from the schoolhouse" as required by N.J.A.C. 6:21-1.3.

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The distance between the Dreifuss home and the Southern Boulevard School was measured by a member of the staff of George A. Snow, County Superintendent of Morris County. The results of the investigation were described in a letter dated January 22, 1988, from Superintendent Snow to the Administrative Law Judge. The letter states:

> This letter is to certify that, as per your request of January 13, 1988, a member of my staff, the County School Business Administrator, measured the distance from the home of the Dreifuss family at 508 River Road, Chatham Township to the Southern Boulevard School. The measurement was completed on January 20, 1988 with a municipally owned walking wheel. The route measured is the shortest distance, covering sections of River Road and Southern Boulevard.
>
> Because the majority of the route involves public roadways without sidewalks, the distance was measured both from the home to the school and from the school to the home. This was determined to be necessary because the guidelines proposed by police and safety officers for pedestrians walking on roadways without sidewalks recommend that the pedestrians walk on the side of the road facing the traffic. Following these guidelines would thus require the routes to and from school to be on opposite sides of the road.
>
> The walking wheel measurement from the home to the school is 10,491 feet, or 69 feet less than two miles. The walking wheel measurement from the school to the home is 10,788 feet, or 228 feet more than two miles. The reason for the differential is that the road has an extended curve and thus the arc on one side is longer than on the other. It should be noted that these measurements were taken between the front entrance of the pupil's residence to the main entrance of the assigned school.

POSITIONS OF THE PARTIES

Respondent denies its obligation to provide transportation on several grounds. They first argue that the distance between home and school should not be measured from the door of petitioner's residence to the school but rather from the closest point where the child's route intersects the public roadway or walkway. However, even if this distance were correctly measured from the entrance to the home to the school, the regulation

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requires that remoteness be measured by distance from home to school, which is less than two miles. In any case, the longer distance from school to home is measured by a route which takes into consideration the traffic hazards present and therefore cannot be used as a measure of the distance under the regulations.

Petitioner takes the position that his daughter is entitled to transportation because he lives more than two miles from the school.

DISCUSSION OF LAW

N.J.A.C. 6:21-1.3 provides:

> (a) The words "remote from the schoolhouse" shall mean beyond 2 1/2 miles for high school pupils (grades 9 through 12) and beyond two miles for elementary pupils (grades kindergarten through eight, 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.
>
> (b) For the purpose of determining remoteness in connection with pupil transportation, measurement shall be made by the shortest route along public roadways or walkways from the entrance of the pupil's residence nearest such public roadway or walkway to the nearest public entrance of the assigned school.

The parties concede that, if petitioner is residing "remote from the schoolhouse" as defined in N.J.A.C. 6:21-1.3, petitioner's daughter is entitled to transportation to and from the schoolhouse. It is undisputed that, under N.J.A.C. 6:21-1.3(a), "remote from the schoolhouse" in this case means beyond two miles, since petitioner's daughter is an elementary school student. The resolution of this dispute clearly hinges on the interpretation of N.J.A.C. 6:21-1.3.

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The rules of an administrative agency are subject to the same canons of construction as a statute. In the matter of N.J.A.C. 14A:20-1.1, et seq. 216 N.J. Super. 297, 306 (App. Div. 1987). Respondent, citing In Re Jamesburg High School Closing, 83 N.J. 540, 547 (1980), correctly argues that if statutory language is plain, unambiguous, and not acted upon by different parts of the same or other statutes, the court cannot give it a different meaning. N.J.A.C. 6:21-1.3(b) requires measurement of distance for purposes of determining remoteness by the shortest route "along public roadways or walkways from the entrance of the pupil's residence nearest such public roadway or walkway to the nearest public entrance of the assigned school." Respondent reads this portion of the regulation to mean that the measurement must be made from the point of the public roadway nearest to the entrance of the pupil's residence to the nearest public entrance of the assigned school. This is not the plain language of the regulation. If this were what the agency intended when adopting this regulation, it could have clearly said it. The existing regulation unquestionably provides that measurement must be made from the entrance of the pupil's residence, not from the public roadway. I therefore **CONCLUDE** that the interpretation of N.J.A.C. 6:21-1.3(b) proposed by respondent is incorrect.

I therefore **FIND** that the distances, as measured under the direction of Superintendent Snow from the entrance of the Dreifuss residence to the main entrance of the assigned school along the public roadways, are correct. The problem is that there are two different measurements. The route from home to school is 10,491 feet, 69 feet short of two miles. The measurement from school to home is 10,788 feet, 228 feet more than two miles. The difference is explained by the curvature of the road and the requirement of New Jersey Motor Vehicle Law N.J.S.A. 39:4-34 that pedestrians walk against traffic on all highways where there are no sidewalks or paths provided for pedestrian use. This is exactly the type of route that must be taken by the Dreifuss child to and from school.

It is true that N.J.A.C. 6:21-1.3(a) does not allow State aid for distances of less than two miles for the sole reason of traffic hazards because traffic hazards are considered a local responsibility. However, in this case the measurement is not made to account for traffic hazards but to comply with the provisions of New Jersey Motor

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Vehicle law. I **FIND** that this is an appropriate consideration in determining remoteness. Tenzer v. Board of Education of Tenafly, OAL DKT. EDU 3357-84 (April 2, 1985), aff'd., Comm. of Education (May 17, 1985). To decide differently is tantamount to requiring the child to violate the law when returning home from school. A route may not be determined to be the "shortest route" if it is prohibited by law. I therefore **CONCLUDE** that the shortest route from the entrance of the pupil's residence nearest the public roadway or walkway to the nearest public entrance of the assigned school, is 10,491 feet from home to school and 10,788 feet from school to home.

The language of N.J.A.C. 6:21-1.3(b) uses the distance from home to school in determining remoteness. If the regulation is taken literally, only the distance from home to school may be used, not the distance from school to home. This leads to the result that the child is not entitled to transportation. However, if the locations of the school and home were interchanged, then transportation would be appropriate. The interpretation of the regulation proposed by respondent leads to an irrational result when applied to this case.

> A statute will not be construed so as to reach an absurd or anomalous result. McKenna v. Wiskowski, 181 N.J. Super. 482, 489 (Chan. Div. 1981).

It is clear that the drafters of the regulation did not anticipate a situation in which the distance from home to school would differ from the distance from school to home.

> Where the drafters of a statute or ordinance did not consider or contemplate a specific situation, a court should interpret the enactment "consonant with the probable intent of the draftsman had he anticipated the situation at hand."

Matlack v. Burlington County Bd. of Chosen Freeholders, 194 N.J. Super. 359, 361 (App. Div. 1984), certif. den. 99 N.J. 191 (1984). The court (at 362) goes on to say

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that the interpretation should rely upon the "breadth of the objectives of the legislation and the common sense of the situation" and that "the objective is to further the legislative purpose."

N.J.S.A. 18A:39-1 is a statute which provides for the transportation of children by local school districts, and it is the one under in which N.J.A.C. 6:21-1.3(b) was promulgated. The purpose of N.J.S.A. 18A:39-1 is to promote the safety and welfare of children. Everson v. Board of Education of Ewing Township, 330 U.S. 1, affirming 133 N.J.L. 350 (E.&A. 1945), cited by the State Board of Education in its decision, Board of Education of the Borough of Fair Lawn, Bergen County v. Bailey and Orlando (June 21, 1984), which reversed the ALJ's decision of May 4, 1984 (OAL DKT. EDU 858-84).

If the safety and welfare of an elementary school child is promoted by providing transportation where the distance the child travels to school is at least two miles (or a round trip of not less than four miles), it is "consonant with the probable intent of the draftsman" to assume that the same safety and welfare considerations apply where the round trip journey of the child is 159 feet more than four miles. I therefore **FIND** that the regulation requires transportation of an elementary school child as long as the average distance of the shortest routes from school to home and from home to school, measured along public roadways or walkways from the entrance of the pupil's residence nearest such public roadway or walkway to the nearest public entrance of the assigned school, is beyond two miles.

Based upon the above, I **CONCLUDE** that Katherine Dreifuss is entitled to transportation to and from the Southern Boulevard School under N.J.A.C. 6:21-1.3.

There is little danger that the unusual set of circumstances found in the present case will cause the Board to be flooded with students requiring transportation.

Accordingly, it is **ORDERED** that the Chatham Township Board of Education immediately comply with the provisions of N.J.S.A. 18A:39-1 and N.J.A.C. 6:21-1.3(b) and

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provide transportation for petitioner's daughter, Katherine Dreifuss, from her residence to and from the Southern Boulevard School. No other relief was requested by petitioner.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

April 13, 1988
DATE

Edith Klinger
EDITH KLINGER, ALJ

Receipt Acknowledged:

4-14-88
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

APR 15 1988
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

PAR/e

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DAVID C. DREIFUSS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CHATHAM, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon review of the record, the Commissioner agrees with the findings and conclusions of law determined by the ALJ and adopts them as own. As correctly noted by the ALJ, the anomalous circumstances of this matter necessitate reaching a result which is consonant with the probable intent of the legislators drafting the statute and, particularly in this case, "the common sense of the situation," as articulated in Matlack, supra.

Accordingly, the ALJ's recommended decision granting transportation entitlement to K.D. is adopted for the reasons well-expressed in the initial decision.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

May 25, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6174-87
AGENCY DKT. NO. 278-8/87

FRANK CARADONNA,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF SADDLE RIVER,

Respondent

Louis B. Bucceri, Esq., for petitioner
(Bucceri & Pincus, attorneys)

Margaret Sullivan, Esq., for respondent
(Sullivan & Sullivan, attorneys)

Record Closed: March 24, 1988 Decided: April 7, 1988

BEFORE: **WARD R. YOUNG, ALJ:**

I.

Frank Caradonna, a tenured teacher of physical education employed by the Saddle River Board of Education (Board) for over 19 years, alleged action of the Board in withholding his employment and adjustment salary increments for the 1987-88 school year was arbitrary, capricious, and/or unreasonable.

The Board denied the allegation and seeks dismissal of the Petition of Appeal.

The matter was transmitted to the Office of Administrative Law as a contested case on September 11, 1987 pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on November 12, 1987, and the matter proceeded to plenary hearing on February 22 and 23, 1988. Post-hearing submissions were filed by the parties and the record closed upon receipt of final submissions on March 24, 1988.

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II.

The primary reason for the Board's action was an "incident involving the supervision, or lack of same, of a first grade class." See, P-3. Additional reasons were considered by the Board and referred to in P-1 as follows:

a) Comment under B of Caradonna's 1986-87 annual evaluation: "As discussed previously, special attention in the primary instructional program needs to be focused on group and individual activities which develop gross motor coordination in an atmosphere that fosters individual and group safety. Gymnastic equipment should only be used in the presence of an adult who is "spotting" during the use of equipment." See, P-4, page 2.

b) Comments under E2 of Caradonna's 1986-87 annual evaluation: "As stated in last year's (1985-86) individual, professional improvement plan and subsequently discussed this year, continue to be aware of safety issues related to the implementation of the physical education program at Wandel School, especially in the areas of supervision and use of equipment in the primary and athletic programs. Demonstrate more flexibility and willingness to resolve issues in a positive, productive, and professional manner so that resolutions to parental and administrative concerns reflect cooperative, working relationships with all." See, P-4, page 4.

c) Comments under Major Duties 10 and 3 on the annual Professional Improvement Plan which is part of the above mentioned evaluation: "As stated in last year's PIP (1985-86), continue to be aware of safety issues related to the implementation of the physical education program at Wandell School; especially in the areas of supervison and use of equipment in the primary and athletic programs . . . Make sure that an adult "spotter" is directly present under gymnastic equipment when it is being used . . . ." See, P-4, page 5.

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d) Comments under Major Duty 10 on the Professional Improvement Plan part of your annual evaluation for the 1985-86 school year: "Continue to be aware of safety issues (i.e., softball equipment) related to the implementation of the physical education program at Wandell School and address these issues with students." See, P-8, page 4.

e) Comment #2 on an observation report of March 30, 1987: "Some boys were 'catching' the basketball nets as they jogged around the gym. One team member should have corrected this situation immediately rather than let it continue. The boys, when questioned by me, said that they were allowed to do this on a regular basis. As you and I both know, 'catching basketball nets' during jogging should never be permitted." See, P-11.

III.

The scenario of this dispute began sometime in early Spring of 1987 when an aide [Furlong] to a first grade teacher [Kelly] went to the gymnasium to escort the first grade class from its physical education class back to the classroom. Furlong testified that the physical education teacher [Caradonna] was not present in the gymnasium; some children were gathered at the gymnasium door; and other children were gathered around a climbing rope; and one child was climbing the rope. Furlong advised Kelly of her observation. Kelly did not report the incident to anyone [for which she was subsequently reprimanded].

Furlong disclosed the incident to some parents, who relayed the information to a Board member, who in turn advised the Superintendent [Collins] of the incident in late May. The lapse of time between the alleged incident and the reporting of same to Collins was about two months.

Collins conferred with Caradonna and the latter's immediate supervisor, the vice-principal [Lee], and charged Caradonna with leaving a class unattended, which served as the sole basis for the withholding recommendation by Collins. See, P-2 and P-3.

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IV.

The inconsistency between the four 1986-87 observations of Caradonna (see, P-12, 11, 15 and 13 in chronological order) and his summative evaluation (see, P-4) is noted. It is not unreasonable to conclude that Caradonna is assessed as an above-average teacher. Nevertheless, the rationale for the recommendation from Collins for withholding was the alleged charge of leaving a class unattended.

V.

When did the alleged incident occur? The occurrence is not disputed, but when it happened and the mitigating circumstances surrounding it are very much in dispute. Furlong could not identify the date.

Caradonna testified that he did not recall leaving a class unattended at the time of his conference with Collins and Lee in late May. It was not until 11:30 p.m. on June 3, the night following his meeting with the Board, that it dawned on Caradonna that the only possible time he left a class unattended was on March 26, when a first grade child, "Tal," fell from the climbing rope and suffered a bleeding nose. He immediately called Furlong, he said, and she had no recall of the "Tal" incident.

A review of P-7, an accident report, indeed verifies the "Tal" incident as having occurred on March 26. The dilemna of alternatives facing Caradonna between attending to "Tal" or leaving his class unattended was buttressed by the believable testimony of nurse Rutz, who stated she "was attending a kindergarten "dinosaur" show at the time of the "Tal" accident. Collins also stated that he may also have been attending the show. Caradonna testified that he could not get a response from either the nurses' office or the central office when he called for assistance to resolve his dilemna. I believe him.

Caradonna further testified that he chose to care for the bleeding "Tal", and instructed the children in his class to line up at the door while he attended to "Tal". Assuming the Furlong allegation related to her observation on the date of March 26, it is not unreasonable to believe that some first graders chose not to pay heed to the "line up at the door" instructions of Caradonna.

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Caradonna determined the care of injured "Tal" to be a higher priority than staying with his class, particularly when he instructed them to line up at the door. Collins believes that leaving a class unattended for any reason is unexcusable.

I believe and **FIND** that the observation of Furlong and the accident to "Tal" both occurred on March 26.

VI.

The entire scenario underlying this dispute may have been the result of deteriorating human relations and is indeed suspect for a number of reasons.

A rift had apparently developed between the principal characters in this dispute. Lee was critical of certain Caradonna practices. Caradonna complained about an overlapping of the presence of classes assigned to him because of early "deliveries" and/or late "pick-up" of classes by either classroom teachers or aides. Caradonna was no longer coaching allegedly because of the criticisms of Board members.

A serious conflict of testimonial evidence arose concerning the March 26 incident between Furlong, Caradonna, and custodian Rongo related to what Furlong saw and didn't see. The credibility of Furlong is the least plausible.

A review of P-2 and P-3, memoranda from Collins to Caradonna, reveals the sole allegation underlying the withholding action to be the leaving of a class unattended. The notice of the Board's action (P-1), however, incorporate other reasons.

The observations and annual evaluation of Caradonna by Lee resulted in the latter's recommendation for the award of salary increments for Caradonna, and all preceded her knowledge of the Furlong allegation, which Lee testified caused her to change her mind and support the withholding action. Nevertheless, Lee testified at considerable length in support of the Board's action by extensive reference to her observations.

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VII.

The standard of review in increment cases was clearly established in Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288 (App. Div. 1960), wherein it was held that the question to be resolved is whether the Board had a reasonable basis for its action. It cannot be disputed that the burden of proving unreasonableness in this matter rests with Caradonna. Caradonna has met that burden based on the adoption of the following **FINDINGS OF FACT:**

1) The unattended class on March 26 is the only basis for the Board's withholding action.

2) The additional reasons stated in P-1 were incorporated in Lee's observations and utilized as a basis for the summary evaluation wherein the increment awards were recommended.

3) The record is void of any indication of intent by either the Superintendent or the Board to withhold Caradonna's increments based on his observations and evaluation, leaving only the Furlong allegation as the sole basis for its action.

4) The mitigating circumstances associated with the unattended class support the sound judgment of Caradonna to care for a bleeding child.

5) The isolated instance of Caradonna leaving his class unattended under these circumstances is insufficient to serve as a rational basis for the Board's withholding action.

6) The exercise of the Board's undisputed discretionary authority was, in this instance, arbitrary and unreasonable.

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I **CONCLUDE** that the Board's withholding action shall be set aside. The Board is hereby **ORDERED** to reinstate the increments withheld, and to compensate Caradonna in the amount withheld as if the action had not occurred.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Commissioner Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

7 April 1988
DATE

WARD R. YOUNG, ALJ

Receipt Acknowledged:

4-12-88
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

APR 12 1988
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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FRANK CARADONNA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SADDLE RIVER, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law.

It is observed that the Board's exceptions to the initial decision, as well as petitioner's reply, were timely filed pursuant to N.J.A.C. 1:1-18.4. The Board in its exceptions relies in part upon the transcripts of the hearings in support of its contention that the ALJ made unsupported findings of fact and misapplied the relevant law in reaching his conclusions and recommendations with respect to the matter controverted herein.

Initially, the Board takes issue with the ALJ's finding of fact that its decision to deny petitioner his salary increment for the 1987-88 school year was based solely upon a single incident at which time he left his first grade pupils who were scheduled for physical education with him unattended in the school gymnasium. The Board maintains that those findings of fact which appear as nos. 1 and 3 on page 6 of the initial decision are not supported by the record especially in view of the factual stipulation entered by the parties that the Board was advised of petitioner's previous performance; that the Board was advised of his evaluation which incorporates his observations; that both Superintendent Collins and petitioner's supervisor, Dr. Lee, reported to the Board; and that the statement of reasons which enumerated more than one of safety concerns (P-1) according to the ALJ "will speak for itself" (Tr. 60-61, 125, 2/23/88)

The Board also excepts to the finding of the ALJ which holds that "the observation of Furlong [former teacher's aide] and the accident to "Tal" both occurred on March 26 [1987]." (Initial Decision, ante)

The four points of exception to the above finding are directly keyed to the testimony of the witnesses contained in the transcripts of these proceedings upon which the Board relies as set forth below:

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Judge Young blanketly stated that the two separate incidents both occurred on the day of the nosebleed, March 26, 1987. He did not explain how he determined this. He can't because the record shows the incidents occurred on different days. There are too many unreconciled facts.

First, on the day of the nosebleed the injured boy "TAL" bled heavily onto the gym floor leaving a trail from the mats across the gym all the way to the nurse's room nearby (Caradonna Direct tr. p. 32 L. 5-7); Court observation in Collins' testimony, tr. p. 30 L. 13-18; Custodian Rongo testimony, tr. p. 76 L. 3-6); however, on the day the teacher's aide observed the child at the top of the rope, she was in the gym and saw no blood. (Furlong testimony, tr. p. 41 L. 23, p. 42 L. 1)

Secondly, on the day of the nosebleed, the custodian met Petitioner in the hallway. He then went to the closet across from the gym and soon joined Petitioner in the gym with rags to clean up the blood. (Rongo testimony, tr. p. 76 L. 8-10, L. 21-23, p. 80 L. 5-7) (Caradonna direct tr. p. 35 L. 6-8). At no time was he in the locker room with Petitioner (Rongo testimony tr. p. 79 L. 14-15); however, on the day the aide made her observation of the unattended class, she did not see Petitioner or the custodian in the gym or the hallway. (Furlong testimony, tr. p. 39, L. 22-25) She heard their voices outside the gym and then saw them walk out of the locker room alcove. (Furlong testimony, tr. p. 38 L. 23-39, L. 5; p. 40 L. 3-16).

Thirdly, Petitioner testified that during the <u>entire</u> nosebleed incident <u>all</u> of the children stayed far away from the ropes and remained by the gym door. (Caradonna direct tr. p. 33 L. 304, p. 34 L. 3-6, cross tr. p. 56, L. 9-16). On the day the teacher's aide was there, she saw only a few children by the door, the remainder staying by the first grader who was up the rope. (Furlong tr. p. 39, L. 7-11)

Fourth, when "TAL" was hurt Petitioner testified that the children were "naturally" anxious and talked about it (Caradonna direct tr. p. 32, L. 7-9, p. 33 L. 3-6); but on the day the little girl was at the top of the rope, the children were yelling to the aide to look at [B.] on the

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> rope and said nothing about TAL or any blood. (Furlong tr. p. 38 L. 15-22; tr. p. 41 L. 1-9, L. 20, p. 42 L. 1)
>
> Lastly, additional testimony supports the conclusion that two different days are involved. The teacher's aide does not remember TAL's being hurt. Also, she did not go to the gym to pick up that class every day. (Furlong tr. p. 49 L. 14-21) By Petitioner's own admission, the first grade gym class used ropes on more than one day in March and had in fact used the ropes throughout the year (Caradonna cross tr. p. 43 L. 17, p. 44 L. 6)
>
> The judge did not and could not resolve these basic undisputed factual differences between the two episodes. Instead of reasonably concluding the events occurred on different days, he simply, inexplicably declared the two incidents to have occurred illogically at the same time.
>
> The facts of the matter are that the two incidents occurred on different days. On one day there was a nosebleed; on another Petitioner simply wasn't there. Petitioner himself explained how he could have left the class unattended: if the aide or teacher was late in picking up the class at the end of the period he said he would walk out. (Caradonna cross tr. p. 68 L. 22-24; Lee tr. p. 87 L. 15-24) (emphasis in text) (Board's Exceptions, at pp. 3-5)

Additionally, the Board points out what it considers to be other factual discrepancies in the ALJ's findings in the initial decision:

1. The ALJ mistakenly assumed that some first graders on the date of the "Tal" incident did not obey petitioner's instructions to stay near the gym door. This assumption directly contradicts petitioner's own unrefuted testimony that all the children stayed at the gym door the entire time. (See Board's Exceptions, at p. 6; Caradonna Direct A.M., Tr. 2/22/88, pp. 33-34; Caradonna Cross P.M., Tr. 2/22/88, p. 56.)

2. The ALJ mistakenly stated that Superintendent Collins testified that leaving class unattended for any reason is "unexcusable." (Initial Decision, at p. 4) The Board maintains that Collins never said this but rather he testified that it was a "judgmental thing." (Tr. 2/23/88, pp. 31-32)

The Board further contends that the ALJ's findings and conclusion are defective on two other grounds:

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1. The ALJ substituted his own opinion for that of the administrators and the Board.

2. The ALJ's uncritical acceptance of petitioner's testimony and preoccupation with the "Tal" incident improperly shifted the burden of proving petitioner's allegations upon the Board without giving due regard to other incidents of pupil safety violations adduced from his immediate supervisor, Dr. Lee, and incorporated into petitioner's annual evaluation.

With regard to the Board's assertion that the ALJ misapplied the law set forth in point 1, the Board states in its exceptions:

> The administrators had already analyzed Petitioner's conduct and his effort to justify it. They particularly examined his singular excuse that he was otherwise occupied. Yet the court decided to investigate the fact on its own (Collins cross tr. p. 22 L. 21, p. 23 L. 1). In doing so, the court made determinations and value judgments about events and teachers when it was more reasonable for the superintendent and Petitioner's superior to do so "bearing in mind that they were experts, admittedly without bias or prejudice, and closely familiar with the mise en scene***." Kopera v. W. Orange Bd. of Ed., 60 N.J. Super. 288, 297 (App. Div. 1980 (sic)). Respectfully, the judge was not familiar with the situation. He was only to determine whether the Board had a rational basis to withhold.
>
> Moreover, the judgment interposed for that of the Board relies on Petitioner's contradictory testimony. (Board's Exceptions, at pp. 6-7)

Examples of such instances are cited from the transcripts of the proceedings by the Board in its exceptions on pages 7 and 8. They are incorporated herein by reference. More specifically, however, the Board cites as one of its examples in support of its exceptions the following:

> Probably the clearest example of the judge's interjecting his own opinion arose when Petitioner was being questioned about his safety practices, spotting and spotting techniques. When Petitioner was asked what constituted spotting, the judge said he would take notice of what constitutes spotting because he (the judge) was a former physical education teacher with a master's degree in administration and supervision of physical education. (Caradonna cross tr. p. 39 L. 8-15) Later the judge made remarks about spotting first graders swinging on ropes mentioning again that he knew physical

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education. (Caradonna cross tr. p. 54 L. 1, p. 55, L. 8) It suggests there was an additional witness at the hearing.

Even if the judge were somehow permitted to reexamine the facts or become an inadvertent expert witness, the worst he could conclude was that a factual disagreement existed, in which case, the Baord's decision must be upheld.
(Board's Exceptions, at pp. 8-9)

With regard to point 2 of the Board's contention that the ALJ misapplied the law in these proceedings, the Board maintains that the ALJ failed to consider all the facts the Board heard at its meeting of June 9, 1987 (P-1) aside from the teacher's aide report which facts justified its decision to withhold petitioner's salary increment for the 1987-88 school year. In this regard, the Board relies on the Commissioner's decision in Theodore E. Greene v. Board of Education of the City of Perth Amboy, Middlesex County, decided by the Commissioner June 8, 1984 wherein the Commissioner adopted as his own the ALJ's finding cited in Colavita v. Hillsborough Township Board of Education, 1983 S.L.D. 1205 which reads in pertinent part as follows:

[T]he reason for an increment withholding action need only be supported by a showing that the board had a reasonable basis to take the controverted action. There is no need to prove, by a preponderance of credible evidence that the allegations against petitioner are true. To do so, would convert an increment withholding action into a tenure case and, accordingly, shift the burden of proof to the board. Such is not the purpose of an appeal to the Commissioner under provisions of N.J.S.A. 18A:29-14. [U]pon the principle that the board need not prove the truth of the allegations against petitioner while petitioner must show that he earned the withheld salary increment, I find that petitioner failed to show that he earned the controverted salary increment and I further find that the board had, in all the circumstances, a reasonable basis to take this controverted action***. (at 1217)
(Greene, Slip Op., at p. 22)

In rejecting the Board's exceptions to the initial decision, petitioner maintains that the Board's assumption that the ALJ may not view proofs in light of his own knowledge and experience, then no review of an increment withholding would be possible. Petitioner further distinguishes the standard of review in Kopera, supra, from the facts in this matter. He contends that those who judged him were not without bias and that his increment was withheld as "part of an irrational panic by the Board and the administration after the rumor by Furlong [teacher's aide] about

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Caradonna [petitioner] circulated among the parents in the district." (Petitioner's Reply, at p. 2)

Thus, it is petitioner's contention that the ALJ correctly found that the Board's sole reason for withholding his increment was due to the report filed by Furlong stating that she found a pupil climbing a rope in petitioner's gym class with no teacher present. Petitioner further contends that it was this incident alone which lead his supervisor, Dr. Lee, to change her mind and recommend that his increment be withheld. (Tr. 2/23/88, p. 122)

Petitioner also points out that Furlong never reported this incident to the administration. (Tr. 2/23/88, pp. 4-5, 8, 25-26)

Further proof with regard to the single incident episode, petitioner argues, is contained in comparing the letters, P-2 and P-3, that he received from the Superintendent with those reasons set forth in P-1 from the Superintendent. On pages 3-7 of petitioner's reply to the Board's exceptions incorporated herein, petitioner relies on the exhibits in evidence and the transcript of the testimony of the Board's witnesses at the hearing as well as his own testimony, to support the ALJ's finding that the two events, Furlong's observation of his unattended class and the "Tal" accident, were actually one incident which occurred on March 26, 1987.

Petitioner maintains that given the fact that the ALJ properly found and concluded that the Furlong allegation was proven to be groundless, the remaining reasons given by the Board in (P-1) were never intended to serve as reasons for withholding his increment because he was not given an opportunity prior to receiving P-1 to address those additional reasons before the Board took action against him.

In conclusion, petitioner maintains that:

> Of primary significance is the utter failure on the part of the Board to substantiate the claim of "consistent" safety failures or failures as to supervision. Three of the five "additional" reasons clearly state that petitioner is to "continue" to be aware of safety. (P-1, P-4, P-8) Urging the continuation of a practice necessarily admits its prior existence. These comments were merely exhortations as to a continuation of efforts already acknowledged to exist. They do not evidence failure, they evidence achievement! (emphasis in text)
> (Petitioner's Exceptions, at at p. 9)

The Commissioner has made an independent review of the transcripts of the testimony of the witnesses at the hearings conducted in this matter along with those exhibits marked in evidence and made part of the record of this case.

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It is observed that the parties in advancing their respective positions in connection with the findings and conclusions in the initial decision also rely extensively on portions of the transcripts of the testimony of the witnesses adduced at the hearings.

In the Commissioner's judgment the central issue presented for determination herein is whether or not the Board had a reasonable basis for the action it took in withholding petitioner's increments for the 1987-88 school year. Kopera, supra

In reviewing the ALJ's findings of fact set forth in the initial decision, ante, in conjunction with the transcripts of the testimony and exhibits in evidence, the Commissioner finds as being persuasive the arguments advanced by the Board in seeking reversal of the initial decision. It is evident that the initial event leading up to the Board's increment withholding action against petitioner commenced with the information it received regarding an allegation that petitioner had left a class of first graders unattended and unsupervised in the gym (Furlong observation) during the latter part of the 1986-87 school year. The written memoranda dated May 28 and June 3, 1987 (P-2 and P-3) which petitioner received from Superintendent Collins attest to this finding. However, it was not until June 9, 1987 that the Board met and took official action to withhold petitioner's salary and adjustment increments at that time. The Board's reasons for its action were subsequently given in writing to petitioner on June 16, 1987 (P-1) as cited in Section II of the initial decision, ante. It is observed from the comments made by petitioner's immediate supervisor, Dr. Lee, in the pertinent sections of his annual evaluations and professional improvement plans for 1985-86 (P-8), 1986-87 (P-4) and from an observation dated March 30, 1987 (P-11), that Dr. Lee expressed concern to petitioner that he continue to concentrate his efforts to properly supervise his pupils in his physical education classes and to take proper safety precautions in connection with the conduct of class activities. Such safety precautions included, but were not limited to, the manner and use of physical education equipment with his pupils.

Consequently, the Commissioner finds and determines that while the Board may have considered the Furlong observation as the primary reason for focusing its attention on certain of petitioner's prior observations, evaluations and professional improvement plans prepared by Dr. Lee, nevertheless he cannot agree with the ALJ's finding that the record supports the conclusion that the Furlong observation was the Board's sole reason for its increment withholding action. In the Commissioner's judgment, the record of the transcripts supports the Board's contention that the ALJ improperly precluded testimony of petitioner on cross-examination pertaining to what constituted "spotting" of pupils when they were engaged in using gym equipment in physical education class. (Tr. 2/22/88 A.M. p. 39) This is so because one of the Board's reasons in its increment withholding action (safety precautions) pertained to "spotting" of pupils during the use of equipment (P-4, p. 2 and 5). The ALJ's reason for making the above ruling by taking notice

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of what constitutes "spotting" by invoking his own expertise in this area as a former physical education teacher served no useful purpose in this instance because it failed to allow the Board an opportunity to properly cross-examine petitioner with respect to one of its reasons for withholding petitioner's increments. Moreover, such ruling by the ALJ now prevents the Commissioner from accessing petitioner's testimony in that regard.

One of the other central points of the Board's exceptions to the findings and conclusion in the initial decision holds that "the observation of Furlong and the accident to 'Tal' both occurred on March 26, [1987]." (Initial Decision, ante) It is noted that the Furlong observation is reported in the initial decision at Section II page 2 and the "Tal" incident is reported in Section V, page 4 of the initial decision. (See also Caradonna, Tr. 2/22/88 A.M., pp. 30-45; Caradonna-Cross, Tr. 2/22/88 P.M., pp. 47-58; Caradonna-Redirect, Tr. 2/22/88 P.M., pp. 71-73; Rongo, Tr. 2/22/88 P.M., pp. 73-79, Rongo-Cross, pp. 80-88; Butts, Tr. 2/22/88 P.M., pp. 89-94, Butts-Cross, pp. 95-98; Furlong, Tr. 2/22/88 P.M., pp. 36-42, Cross, pp. 43-49, Redirect, pp. 49-50, Re-cross, pp. 50-63.)

The above finding of the ALJ directly impacts on those related findings appearing in the initial decision, ante. It must be pointed out at this juncture that the "Tal" incident was not an incident relied upon by the Board in its increment withholding action, but rather it was made part of these proceedings through petitioner's effort to identify the time of the Furlong observation which could not be ascertained by the Board at that time.

Although the incident related to the Furlong observation is not disputed with respect to its occurrence, the time of the incident which has been found by the ALJ to have occurred on the same date of the "Tal" incident is disputed by the Board.

The record establishes that Ms. Furlong, a teacher's aide, did report the incident to her supervising first grade teacher Ms. Kelly; however, Ms. Kelly failed to report the incident to the administration.

In reviewing the record of the testimony of petitioner, Rongo, Butts and Furlong, previously cited herein, the Commissioner cannot agree with the ALJ's finding and conclusion that both of the above-cited incidents coincided on March 26, 1987.

This determination is grounded upon the fact that the ALJ, in attempting to provide a nexus between the Furlong observation and the "Tal" incident, has used petitioner's testimony and the testimony of Furlong which is contradictory with regard to each incident in order to find that they occurred at approximately the same time on March 26, 1987.

In reviewing the respective testimony of Furlong and petitioner, it becomes apparent that petitioner testified that all of the pupils stayed far away from the climbing ropes and remained

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by the gym door during the "Tal" nosebleed incident. (Caradonna Tr. 2/22/88 A.M., p. 34, Caradonna-Cross, Tr. 2/22/88, P.M., p. 56)

On the other hand, Furlong testified that on the day she went to get the first grade pupils from the gym she saw only a few pupils by the door, the remainder of the pupils were staying by pupil B. who had climbed to the top of the climbing rope in the gym while the class was left unattended by petitioner. (Furlong, Tr. 2/23/88, p. 39)

The dilemma caused by the ALJ's finding in this regard is that he attaches credibility to the occurrences of both the Furlong observations and petitioner's testimony regarding the "Tal" incident, but he leaves unresolved the differing circumstances under which they were related to have occurred by these witnesses.

The Commissioner cannot agree, therefore, with the ALJ's finding that both of the aforementioned incidents occurred on the same date at approximately the same time given the testimony of Furlong and petitioner. The only conclusion to be reached is that each of these incidents did occur, but not at the same time or possibly not on the same date. The Commissioner so holds.

For all of the forgoing reasons, the Commissioner having independently reviewed including the transcripts of the testimony of the witnesses (In re Morrison, 216 N.J. Super. 143 (App. Div. 1987)) finds and determines that the Board, when it determined to withhold petitioner's increments for the 1987-88 school year on June 9, 1987 (P-1), had a reasonable basis for doing so in accordance with the Kopera, supra, standards.

Accordingly, the Commissioner reverses the findings and conclusion in the initial decision and further determines that petitioner has failed to carry his burden of proof in support of his allegations in his petition that the Board's action in withholding his salary increment was arbitrary, capricious or otherwise illegal.

The instant Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

May 25, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5423-87
AGENCY DKT. NO. 234-7/87

PAT FORTE,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE,

Respondent

Robert M. Schwartz, Esq., for petitioner

Nathanya G. Simon, Esq., for respondent
(Schwartz, Pisano, Simon & Edelstein, P.C.)

Record Closed: February 29, 1988 Decided: April 14, 1988

BEFORE: **WARD R. YOUNG**, ALJ:

Petitioner, a tenured elementary school principal, alleged the Belleville Board of Education (Board) violated his tenure rights when it transferred him to the position of high school vice-principal without his consent.

The Board denied the allegation and seeks dismissal of the matter as its action was an exercise of its discretionary authority consistent with law.

The matter was transmitted to the Office of Administrative Law as a contested case on August 10, 1987, pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on September 3, 1987, and the matter proceeded to plenary hearing on January

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25, 1988 after the good faith efforts of counsel failed to realize an amicable resolution of the dispute. Post-hearing submissions were filed by both parties, and the record closed on February 29, 1988, the date established for responses, which were not filed.

I.

Petitioner has been continuously employed as a teaching staff member by the Board since September 1, 1961. He was appointed to the position of elementary school principal on May 1, 1974. On February 23, 1987, petitioner was transferred by the Board, upon recommendation of the Superintendent of Schools, to administrative duties in the central office while retaining his title of elementary principal. Petitioner contested this transfer by filing a petition of appeal with the Commissioner of Education on the basis that it was nonconsensual and therefore unlawful, but later withdrew the petition. His testimony at hearing in the instant matter revealed that he had expressed a willingness to remain at the central office. While the initial petition (OAL DKT. EDU 4219-87, AGY REF. 137-5/87) was pending, the Board transferred petitioner from his assignment in the central office to the position of high school vice-principal at no change of salary, effective September 1, 1987. This matter is the result of that transfer based on petitioner's contention that it was nonconsensual and therefore unlawful. The initial petition was then withdrawn because of mootness. See, P-2.

The issue framed at the prehearing conference incorporated petitioner's claim that his transfer to the position of high school vice-principal violated his tenure and seniority rights. The parties agreed on December 15, 1987 to delete the seniority rights violation as there had been no reduction in force. A motion for summary decision by the respondent Board was denied orally because of the disputed material fact concerning consent by petitioner to his transfer to the position of high school vice-principal.

II.

Petitioner had considerable difficulty in recalling specific conferences the Superintendent testified had occurred concerning petitioner's performance as elementary

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principal, his status in the district's organizational chart, and subsequent assignment possibilities. He, nevertheless, steadfastly contended he never consented to his transfer to the position of high school vice-principal.

The Superintendent testified that he met with petitioner on June 29, 1986 and suggested the transfer to the high school, but petitioner rejected the suggestion as he considered a reassignment from elementary principal to high school vice-principal to be a demotion.

I **FIND** that petitioner did not consent to his transfer by reassignment to the position of high school vice-principal.

It is noted that the above **FINDING** is made in rejecting the Board's argument that petitioner indirectly or impliedly consented to a transfer from elementary principal to another administrative assignment by transcendation, since petitioner, subsequent to his transfer to the central office, expressed his willingness to remain there.

III.

A thorough review of testimonial and documentary evidence in this matter reveals the serious problem of the administration of school #4 which the Superintendent and Board were compelled to resolve. No findings of fact are made relative to the incompetencey of petitioner as its principal in the absence of actions of the Board to withhold salary increments or certify tenure charges. Nonetheless, it is abundantly clear the petitioner's performance as principal of #4 was deemed by the Superintendent and the Board to have deteriorated beyond the limit of tolerance.

It is apparent that the Board had no desire to take punitive action against petitioner in recognition of over 25 years of service to the district. Its primary objective was to remove petitioner from a position in which his conduct and administrative judgments were perceived to have a negative impact on teacher and parent relations as well as the thoroughness and efficiency of educational opportunities afforded to its pupils.

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It is recognized that the Board's options were limited. Increment withholding would be economically punitive but would not achieve the Board's primary objective. The certification of tenure charges would achieve the Board's objective through the suspension of petitioner with or without pay, but would be economically and psychologically punitive.

The only alternative for the Board to achieve its objective was the transfer of petitioner without loss of compensation to a position within his certificate. Here the human relations aspect of his responsibilities would be minimized, as would be his decision-making role under the direct and daily surveillance of his immediate supervisor. The transfer of petitioner to the position of vice-principal of the high school without loss of salary was perceived by the Superintendent and Board to be in the best interest of the school district as well as the petitioner.

The petitioner unfortunately chose to challenge this Board action.

IV.

Petitioner argues that the action of the Board was ultra vires in the absence of his consent and relies on decisional law for support. Miscia v. East Hanover Bd. of Ed., 1983 S.L.D. _____ (decided April 4, 1983), aff'd State Bd. 1984 S.L.D. _____ (decided January 4, 1984). Colella v. Elmwood Park Bd. of Ed. 1983 S.L.D. (decided March 10, 1983), aff'd State Bd. 1983 S.L.D. _____ (decided July 6, 1983), affd. N.J. App. Div., July 19, 1984, A-6090-82T3)(unreported).

V.

The Board argues its action was within its discretionary authority and lawful. It asserts that petitioner was transferred laterally from one building level administrative position to another within his certification, which is tenure-eligible and not a demotion. It too relies on decisional law. Williams v. Plainfield Bd. of Ed. 1979 S.L.D. 220, rev'd in part State Bd. 1980 S.L.D. 1552, aff'd 176 N.J. Super. 154 (App. Div. 1980), cert. denied 87 N.J. 306 (1981). Morell v. Parippany - Troy Hills Bd. of Ed. 1980 S.L.D. 532, rev'd State Bd. 1980 S.L.D. 533, rev'd (N.J. App. Div., December 16, 1981, A-1619-80T3), cert. denied 89 N.J. 419 (1982).

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VI.

A determination of the law of this case requires a careful analysis of decisional law as well as the statutory scheme. The brief answer is that boards of education have authority to make involuntary transfers of teaching staff members within the scope of certification, but not from one position to another when the staff member is tenured.

Two conflicting policies which are basic to much of the statutory and regulatory schemes affecting school personnel are at issue, that is, the provision of job security through tenure and the discretionary authority vested in local boards of education to fulfill their responsibilities to provide a thorough and efficient education for its pupils. See, N.J.S.A. 18A:11-1, N.J.S.A. 18A:25-1, and N.J.S.A. 18A:28-1 et seq. See also, Ridgefield Park Ed. Assn. v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978), wherein the Court indicated the exercise of discretional authority by local boards of education to be a "duty."

N.J.S.A. 18A:28-5 provides that dismissal or reduction in compensation of a tenured teaching staff member must result only from procedures imposed by the Tenure Employees Hearing Law, N.J.S.A. 18A:6-9 et seq. N.J.S.A. 18A:28-6 incorporates provisions for tenure acquisition of teaching staff members transferred or promoted with consent. It appears that the only publicly available indication of legislative intent of statutory amendment (L. 1962, c.231, §1) is found in the statement accompanying A-343 in 1962. The amendment was declared to achieve two main goals. The first was to specifically identify and include assistant principals and vice-principals as separate positions deserving of tenure protection. The second was the basis for the transfer provision of a probationary period prior to the acquisition of tenure in a new position for those who previously acquired tenure in another position. The statement does not address the precise meaning of "with consent" incorporated in N.J.S.A. 18A:28-6. We must then turn to case law.

The basic premise in case law is that tenure provisions are remedial laws which should be liberally construed. Thus, Viemeister v. Prospect Park Bd. of Ed., 5 N.J. Super. 215 (App. Div. 1949) held that tenure afforded a district principal security from the sham

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abolishment of his position. However, tenure does not provide absolute protection against all possible negative acts. In Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288, 298 (App. Div. 1960) the court said: "Tenure is a status, a protection, not a contract . . . [thus does protect but] does not give all the same rights to increases or promotions." Petitioner therein claimed the procedurally correct denial of a salary increase equated to a reduction in pay and was therefore a violation of a tenure right. The court disagreed and determined that tenure did not guarantee compensatory increases.

Williams v. Plainfield Bd. of Ed., 1979 S.L.D. 220, rev'd in part, State Board, 1980 S.L.D. 1552, aff'd 176 N.J. Super. 154 (App. Div. 1980), cert. denied, 87 N.J. 306 (1981), concerned a problem quite similar to the instant matter. Petitioner therein, a tenured high school principal, was transferred to the central office as an administrative assistant and then to a position as elementary school principal. The Commissioner set the transfer to elementary principal aside because the future economic impact on petitioner was violative of her tenure right. The State Board determined that the latter transfer was to a position of comparable rank and was neither a reduction in compensation nor a demotion. The Appellate Division followed Kopera and determined that tenured employees have no vested right in any future salary increases, and emphasized the purpose of tenure to provide security in specific positions.

It must be noted that Williams may be distinguished from the instant matter as that transfer was from high school principal to elementary principal, whereas herein the transfer was from elementary principal to high school vice-principal.

Morell v. Parsippany - Troy Hills Bd. of Ed., 1980 S.L.D. 532, rev'd State Bd., 1980 S.L.D. 533, rev'd (N.J. App. Div., Dec. 16, 1981, A-619-80T2) (unreported), cert. denied, 89 N.J. 419 (1982), followed on the heels of Williams. Unlike Williams, Morell involved a transfer from elementary school principal to acting assistant junior high school principal. Both the administrative law judge (ALJ) and the Commissioner affirmed the transfer. The State Board reversed because the duties and responsibilities of the two positions were not comparable (and the new title was temporary) in reliance on Williams and Viemeister, and also on the legislative recognition of the difference between principal and vice-princial or assistant principal in the 1962 amendment. (1980 S.L.D. at 535).

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The Appellate Division reversed in an unpublished opinion in focusing on the issue of the validity of the transfer as a demotion. It determined that a demotion was not proscribed in the statute and reinstated the transfer.

Morell was followed by Colella v. Elmwood Park Bd. of Ed., OAL DKT. NO. EDU 7095-81 (Jan. 26, 1983), rev'd Commissioneer of Education, 1983 S.L.D. _____ (March 10, 1983), aff'd State Board, 1983 S.L.D. _____ (July 6, 1983), aff'd (N.J. App. Div., July 19, 1984, A-6090-82T3) (unreported), wherein a high school principal was transferred to the position of high school vice-principal. The ALJ determined the transfer to be a demotion, but dismissed the matter with emphasis on the authority of a local board to exercise its discretionary managerial authority in reliance on Morell and Williams. The ALJ's analysis stressed that both positions were held under the same certification. The Commissioner reversed in a declaration that tenure attaches to a position rather than certification, and relied on Childs v. Union Twp. Bd. of Ed., 1980 S.L.D. 1145, aff'd State Bd., 1981 S.L.D. 1404, aff'd. (N.J. App. Div., July 19, 1982, A-3603-80T1) (unreported), and Howley v. Ewing Bd. of Ed., 1982 S.L.D. 1328, aff'd State Bd., 1983 S.L.D. _____ (June 2, 1983).

The Commissioner's reference to Childs does not appear to be on point as it was chiefly concerned with differences in certificates. However, reliance on Howley indeed validates the Commissioner's decision in Colella, wherein pointed reference is made to the 1962 amendments of N.J.S.A. 18A:28-5 and 28-6, which specifically added the vice-principal as a tenure-eligible position and reenforced that tenure is acquired in a particular position, since the latter statute repeatedly uses position to determine tenure status after transfer.

Colella also distinguished Williams since the latter involved a transfer with the same rank, and Morell since the Appellate Division's narrow finding therein was that the statute did not prohibit demotion. Both the State Board and Appellate Division affirmed the determination of the Commissioner that tenure is conferred in a specific position, and that tenure rights are defined by positions, not certification.

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Miscia v. East Hanover Bd. of Ed., 1983 S.L.D. _____(March 31, 1983), rev'd State Bd., 1983 S.L.D. _____ (Oct. 26, 1983), reconsidered and aff'd., State Bd. 1984 S.L.D. _____ (Jan. 9, 1984) concerned a transfer in reliance on Williams and Morell. The Commissioner reversed in reliance on Colella. The State Board initially upheld the transfer in affirmance that transfers within a certification were permitted without consent, but reversed its determination on reconsideration in reaffirmance of Colella and rejection of the Appellate Division's unreported analysis in Morell. The State Board emphasized that removal of a tenured position without consent must be in accordance with the Employee Tenure Hearing Law, N.J.S.A. 18A:6-10 et seq.

There has clearly been some confusion and disagreement in case law. Williams, the only relevant published decision, approved an involuntary transfer. However, Williams cannot control the matter herein since it is highly distinguishable on two counts: not only were the positions of comparable rank (principal to principal), but the Appellate Division had only to address the issue of reduced salary expectations.

The unreported decision of the Appellate Division in Morell, on point as to facts with the instant matter, has been rejected in subsequent analyses in Colella and Miscia.

Although the Belleville Board's point is well taken, that both petitioner and respondent herein would benefit if its non-consensual transfer is upheld, the statutory scheme and case law require a different result.

VII.

In summary, I **FIND** that the transfer of Pat Forte from his tenured position as elementary principal to the position of high school vice-principal by the Belleville Board of Education was without Forte's consent, and was violative of his tenure right of protection in his position as elementary principal. I **CONCLUDE**, therefore that Pat Forte shall be reinstated to his position as elementary principal. **IT IS SO ORDERED.**

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This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Commissioner Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

14 April 1988
DATE

WARD R. YOUNG, ALJ

4-14-88
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

APR 19 1988
DATE

Mailed To Parties:
FOR OFFICE OF ADMINISTRATIVE LAW

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PAT FORTE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The Board's exceptions and petitioner's reply thereto were timely filed pursuant to N.J.A.C. 1:1-18.4.

In addition to incorporating by reference all its factual and legal arguments presented in its post-hearing brief as support for its position that the ALJ erred in reaching his determination in this matter, the Board takes exception to the finding that petitioner did not consent to a transfer to an administrative position other than elementary principal. It contends that petitioner's testimony was not only self-serving and hostile but also inconsistent and unduly vague, averring, inter alia, that it was only on rebuttal that he recalled giving consent to the Superintendent to remain in an administrative position beyond June 1987. The Board also contends that (1) petitioner "gave indications" of providing consent when he agreed to stay in the central office position beyond June 1987 and abandoned legal proceedings contesting same and (2) the district obtained consent to the transfer "in an indirect manner."

Moreover, the Board takes exception to the ALJ's findings and conclusion that petitioner's transfer from elementary principal to high school vice-principal, without his consent, was violative of his tenure rights. As to this, it argues that the Commissioner must take into account that portion of the initial decision which states that the evidence in the matter reveals the serious problem with the administration of the school where petitioner was principal and that it was apparent that the Board had no desire to take punitive action against him given his more than 25 years of service to the district. While acknowledging that the ALJ carefully analyzed the relevant case law cited by both parties, it nonetheless reiterates its argument that Morell, supra, and Spence v. Board of Education of the Township of Piscataway, decided by the Commissioner October 8, 1980 are controlling and avers that the following factors are the only crucial ones for finding in its favor:

1. Petitioner remains a tenured building level school administrator within the school district of Belleville.

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2. Petitioner's certification qualifies him for each of the positions involved.

3. The Board of Education possesses the statutory discretionary authority to transfer its employees within certification. Mr. Forte was transferred, laterally, from one building level administrator position to another within certification.

4. Each of the positions involved herein are (sic) tenure eligible recognized positions.

5. Each of the positions involved are (sic) administrative in nature and involve (sic) duties and responsibilities of equivalent and comparable rank and importance to the district.

6. The transfer was not a demotion or a dismissal, nor did it involve a reduction in salary.

7. The categories as set forth in the administrative code provisions are irrelevant to this case since a reduction in force is not involved.

8. It is in the best interest of the entire school system that Mr. Forte be assigned to the vice-principalship at the high school, as opposed to the principalship at an elementary school.

(Board's Exceptions, at p. 4)

In response to the Board's exceptions, petitioner avers that he did not consent to be transferred from his elementary principal position and that no testimony was provided by the Board to support its contention that such consent was obtained. He likewise argues that appearance of consent is not enough avowing that:

> It is simple enough for a Board of Education, through its agents, to ask a teaching staff member whether he consents to a transfer to an Assistant Principalship. The Superintendent of Schools testified that he never "asked" Mr. Forte for his consent. He also testified that he never received Mr. Forte's consent to that transfer. That being the case, it has to be found that the Board of Education did not prove by a preponderance of the evidence that Mr. Forte

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> provided his consent, and therefore his transfer was in violation of his rights pursuant to N.J.S.A. 18A:28-6.
> (Petitioner's Reply Exceptions, at p. 2)

Petitioner relies upon the holdings in such cases as Howley et al., supra; Colella, supra; Miscia, supra, as support of his position that because he acquired tenure as a principal he could not be transferred to vice-principal, particularly the latter two cases which he avers are precedential to the issue.

Upon a thorough and independent review of the record in this matter, the Commissioner is in agreement with the ALJ's findings and conclusion and adopts them as his own. The Board contends that petitioner's testimony should not be credited. However, it provides neither a transcript of the hearing nor a copy of relevant portions thereof to support its exceptions seeking reversal of the ALJ's credibility determination with respect to a consensual transfer. In re Morrison, 216 N.J. Super. 143 Upon careful consideration of the record and with due regard being given to the opportunity of the ALJ to judge the credibility of the witnesses, the Commissioner accepts the ALJ's finding that petitioner did not consent to the disputed transfer herein and finds unpersuasive any arguments of the Board to the contrary.

As to the issue of whether or not a transfer from a tenured principal position to a vice-principal position is legal and proper, the Commissioner is in complete agreement with the ALJ that such transfer is not permissible absent consent, a reduction in force or dismissal through tenure charges. Although conflicting decisions have been rendered on the substantive issue presented in this case, the decisions in Colella, supra; Howley et al., supra; and Miscia, supra, are deemed to be controlling as correctly determined by the ALJ.

The following portion of the State Board's decision in Miscia bears repeating here because it captures well the competing legal arguments, conflicting decisions and somewhat tortuous route this issue of transfer from principal to vice-principal has had, leading ultimately to the conclusion that such transfer is impermissive in circumstances such as in the instant matter. As explained by the ALJ, the State Board reversed the Commissioner's and its Legal Committee's determination that Miscia had been impermissibly transferred from his tenured principal's position, holding instead that non-consensual transfers within certification were permitted based on Morell, supra. The State Board at a later date, however, reconsidered that holding, reversing it, based on Colella, supra, as may be seen below:

> Because this case presents such a significant potential for understanding the nature of educational policy, and because of the threshhold (sic) question of tenure protection and statutory rights which Miscia argues accrue to his benefit, the Legal Committee has thoroughly reviewed its

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prior recommendation that the Commissioner's decision be affirmed, as well as the view expressed by the majority in the initial vote of October 26, 1983.

Having granted what the Legal Committee is convinced is a very careful study of the issues in this case, we recommend that the October 26, 1983 action of the State Board, reversing the Commissioner, be set aside and further, that the initial recommendation of the Legal Committee, to affirm the Commissioner's Decision of March 31, 1983 be affirmed.

However, before making that motion, we think it is necessary and useful to comment as to the Legal Committee's initial recommendation and the majority position in the initial decision of October 26, 1983.

The central question seems to turn on whether or not the action of the East Hanover Board of Education, in removing Miscia without his consent from the position of principal, amounts to a dismissal, in contravention of his tenure rights, or whether such action, without a reduction in salary, constitutes a "demotion," within the discretion of the Board and not violative of Miscia's tenure rights.

Relying on Morell v. Parsippany-Troy Hills, Superior Court of N.J., Dkt. No. A-1619-80T2, December 16, 1981, unreported, certif. denied 89 N.J. 419 (1982), the majority adopts the latter view, that a board of education is within its rights to consider the educational benefit to its students when making transfers of its personnel. Here, the majority obviously feels that the legal "tenure" issue is only part of the several considerations that must affect a decision of the State Board of Education. More important than what might be viewed as the narrow legal issue, the majority view is of the role in establishing wise educational policy, which this case, and others like it, brings to the benefit of the State's children. In considering the expanding research which describes the absolutely critical role that a school principal plays in determining the quality of education, the majority felt that Miscia's non-reduction in salary and a concurrent transfer to a position within the same certificate did not violate his tenure, even when accomplished without his consent.

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However, the Legal Committee respectfully disagrees that the tenure issues herein involved are the less significant of the questions raised.

It is our view that Miscia suffered a dismissal from his tenured principal position. Specifically, our view is premised on the legal principles enunciated in Colella v. Elmwood Park Board of Education, 1983 S.L.D. 149, affd. State Board of Education 172, as well as on the practical analysis of the Elmwood Park Board (and any other Board) in granting an initial "promotion" to one, from whatever position be held, to a "higher" position of principal. N.J.S.A. 18A:28-6 was specifically enacted to define tenure rights in promotion.

No law exists which grants any employee a right of expectation toward advancement along a career ladder. A teacher cannot expect, as a matter of law, to be promoted to a vice-principal; a vice-principal cannot expect to be a principal, any more than a principal can legally claim a right to advancement to Superintendent. We hold the view that having been awarded any such promotion by free choice of the board, that opposite protection exist[s]. That is, after having served the requisite period of time in a new position, as defined in N.J.S.A. 18A:28-6, one cannot be involuntarily removed without suffering a breach of tenure protection. The rights of expectation exist only to the extent that an employee will continue to serve in a tenured position while during good behavior and efficiency.

This does not remove the Board's legal remedies if it desires to remove a tenured employee which it sights as necessary because of inefficiency, incapacity, improper conduct or other just cause. Any practical faults of the procedure for removal, do not rest with the removed employee; nor should Miscia, in this case, be made to suffer the effects of the perceived ineffectiveness of the system.

Miscia was dismissed from his position of principal without having received the proper opportunity to improve, if his removal was based on inefficiency. Nor did the Board afford him an opportunity of a tenure hearing, thus violating his specific tenure rights.

The Legal Committee moves its initial recommendation.

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> Finally, we must separate the discussion of this case to the extent that tenure does not extend to a certificate but to a "position." This view exists with N.J.S.A. 18A:28-6 and supports the notion that the "position" of one against whom a complaint is made, is subject to the loss of that position upon an affirmative showing of incapacity, inefficiency or other just cause.
>
> Indeed, successful tenure charges cause the removal from a "position." Successful charges do not result, proximately, in removal of a certificate. (Slip Opinion, at pp. 2-5)

Accordingly, for the reasons so well expressed in the initial decision, the ALJ's recommended decision in this matter is adopted. Petitioner is to be restored to a principal's position. if the Board believes that he is unable to carry out the duties of such position, it has no choice but to seek his removal through statutorily prescribed means.

COMMISSIONER OF EDUCATION

May 25, 1988

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PAT FORTE,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, May 25, 1988

For the Petitioner-Respondent, Robert M. Schwartz, Esq.

For the Respondent-Appellant, Schwartz, Pisano, Simon & Edelstein (Lawrence S. Schwartz, Esq., of Counsel)

Pat Forte (hereinafter "Petitioner"), a teaching staff member employed by the Board since 1961, was appointed to the position of elementary principal in 1974 and subsequently achieved tenure as a principal pursuant to N.J.S.A. 18A:28-5. On February 23, 1987, Petitioner was transferred by the Board to administrative duties in the central office while retaining his title of elementary principal. Effective September 1, 1987, the Board transferred Petitioner from his assignment in the central office to the position of high school vice principal at no change of salary.

Petitioner filed the instant challenge to the Board's action, alleging that he did not consent to the transfer from his tenured position as elementary principal to the position of high school vice principal, and such a transfer, therefore, violated his tenure rights.

On April 14, 1988, an Administrative Law Judge ("ALJ") determined that the transfer was undertaken without Petitioner's consent in violation of his tenure rights, and recommended his reinstatement to the position of elementary principal.

On May 25, 1988, the Commissioner of Education adopted the ALJ's findings and determination and directed the Board to reinstate Petitioner.

The Board filed the instant appeal, but subsequently, the parties resolved their dispute and submitted a proposed Settlement Agreement ("Agreement") for State Board approval. The pertinent terms of the Agreement are as follows:

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1. FORTE shall retain the title of Elementary Principal, remain on the Elementary Principal's salary guide and continue to accrue all seniority and other benefits to which he is entitled as an Elementary Principal.

2. FORTE shall remain in the position of an Elementary Principal assigned as Vice Principal of the Belleville Senior High School until such time as any other position is agreed to by the BOARD and FORTE.

3. FORTE will not pursue implementation of the New Jersey Commissioner of Education's decision ordering his reinstatement as Elementary Principal and THE BOARD will withdraw its appeal of this decision to the New Jersey State Board of Education. As a result of which, the above captioned matter will be and same is dismissed. and withdrawn with prejudice.

Settlement Agreement, at 1-2.

While the State Board encourages amicable resolution of disputes before us, we cannot permit the Board to employ Petitioner in the separately tenurable position of vice principal while designating that position as that of principal. N.J.S.A. 18A:28-5. See, e.g., Capodilupo v. Board of Education of the Town of West Orange, et al., decided by the State Board, September 3, 1986, aff'd, 218 N.J. Super. 510 (App. Div. 1987), certif. denied, 109 N.J. 514 (1987). The parties may not by agreement alter the operation of the statutes so that the service of a teaching staff member in one separately tenurable position would not be credited towards achieving tenure in that position. Nor can we permit the Board to assign to the position of high school vice principal another recognized position title, along with its status, salary and other benefits, that is not properly descriptive of either the position or the assignment but, rather, is attached to an entirely different assignment within the scope of a different tenurable position. Such an arrangement contravenes the education laws, regardless of the duration of the assignment.[1] As was emphasized in Viemeister v. Board of Education of Prospect Park, 5 N.J. Super. 215, 218 (1949): "We look to the substance [of the assignment] rather than the form...."

---

[1] Our decision is not altered by the fact that the parties have modified their Agreement to eliminate a provision which barred Petitioner from returning to the Belleville Public Elementary Schools as an elementary principal. The fact that the parties have left open the possibility of Petitioner's eventual return to an actual elementary principal assignment does not cure the basic deficiencies of this Agreement under the education laws.

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Pursuant to N.J.S.A. 18A:28-6, the parties are free to reach an agreement for Petitioner's transfer to the tenurable position of vice principal with assignment at the high school level. However, any such agreement must properly designate the tenurable position and the assignment in which he would actually serve. N.J.A.C. 6:11-3.6.

Thus, insofar as the proposed settlement is in contravention of the school laws of the State of New Jersey, we reject the Agreement and direct that it be declared null and void.

On the substance of the Board's appeal, we reject the Board's argument that the Petitioner consented to the transfer to the position of high school vice-principal by the totality of his actions. The fact that the Petitioner, prior to his transfer to the vice-principal position, expressed a willingness to remain at the central office where he performed administrative duties while retaining the title of elementary principal did not act as a voluntary relinquishment of his tenure rights as an elementary principal. Accordingly, for the reasons expressed therein, we affirm the decision of the Commissioner of Education.

November 1, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5775-87
AGENCY DKT. NO. 247-7/87

JOSEPH S. HARRIS,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK,
Respondent.

Stephen E. Klausner, Esq., for petitioner (Klausner, Hunter & Oxfeld, attorneys)

Ralph T. Stanzione, Esq., for respondent

Record Closed: March 4, 1988 Decided: April 15, 1988

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

Joseph S. Harris, petitioner, alleges and the New Brunswick Board of Education, respondent (Board), denies that the Board has falsely claimed economy as the reason for abolishing the petitioner's attendance officer position and that the true reason for abolishment was retaliation for the petitioner's successful defense of tenure charges against him.

The matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law for disposition as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. After notice, a prehearing conference was held on October 6, 1987. Among other things, it was determined that the issue to be resolved is, was the controverted reduction in force made in good faith and, if

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not, to what relief is the petitioner entitled. The matter was heard on February 4, 1988, at the Middlesex County Courthouse, New Brunswick. Five witnesses were heard and nine exhibits were admitted in evidence. Posthearing submissions were timely filed and the record closed on March 4, 1988.

RELEVANT EVIDENCE

There was testimony that the 1986-87 New Brunswick Board of Education audit as of June 30, 1987, showed a surplus of $1.230 million, of which $1.042 million was in Current Expense. The 1987-88 budget cap was 12.6619 percent; the budget actually went to approximately 5.6 percent over the prior year. Negotiated salaries went up seven percent for 1987-88 and will go up an additional 7.5 percent for 1988-89.

The Board of School Estimate did reject the Board's original budget for 1987-88. The tax rate, of course, is a consideration in budget construction. State aid, however, to the City of New Brunswick actually has increased slightly over 1986-87.

At the request of counsel, I took notice of New Brunswick Board of Education v. Joseph Harris, OAL DKT. EDU 7150-86 (Feb. 11, 1987), aff'd Comm'r of Ed. (Mar. 18, 1987). Obviously, Harris was a tenured employee at all times relevant to this case.

The superintendent of schools testified that New Brunswick is a Type I district; that N.J.S.A. 18A:38-33 provides for tenure of attendance officers after employment for one year, and that Harris worked in the position for more than one year.

Harris' position was abolished for economic and other reasons. Statutes require the district to have an attendance officer. The duties of attendance officer have been covered by several persons. No one person has been placed in a position with that title. The superintendent requested of the county superintendent of schools a change in the job title. The Board has no rules, regulations, policy or written approvals for the assignment of other persons to attendance officer duties.

The Board now uses a social worker-attendance officer. Discussions concerning this position began in October 1987. At the time of hearing in this case, the Board was in the process of filling the position (see, R-7).

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Concerning the present school budget, the Board used a three member committee to negotiate the present labor contract. The education association received a 7.5 percent salary increase. Dollar figures were determined before June 30, 1987, and the Board at no point took the position that it could give no increases. Much of the staff, perhaps 70 percent, is at the top of the salary guide. Under the contract in effect through June 30, 1987, the maximum salary for Harris' position was $23,630. When, in March 1987, the Commissioner ordered Harris reinstated, the Board paid him.

Another tenured attendance officer, also reduced in force, has not been placed in another position. It is the position and not the duties of attendance officer that have been abolished. The duties of attendance officer have been delegated to each school (P-1).

The superintendent has known Harris for a number of years and believes Harris was never unable to perform his job. The superintendent helped Harris to get rises in his mileage allowance. There is no personal problem with Harris. Economy and functional reasons are the only reasons for the change. The superintendent had the social worker-attendance officer idea since he worked in Newark some years ago. He began discussing the idea approximately three years ago. He brought the matter to the Board last year. The Board agreed and abolished the position but not the duties of attendance officer. The duties are incorporated in the new social worker-attendance officer position and the superintendent believes that the new position will be more responsive to the needs of New Brunswick pupils.

The superintendent also testified as to tax base, State aid and general budget concerns.

Joseph S. Harris testified that he has been unemployed since June 1987. He served for eight years as attendance officer and for 12 years before that as a security aide at New Brunswick High School. He has had no disciplinary problems and no salary or adjustment increments withheld.

Harris stated that his union president told Harris that the president would talk to people in the personnel officer about securing some other position for Harris. Harris believed he would revert to his security aide position. Harris stated his belief that another employee whose position was eliminated reverted to a security aide position.

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Harris believes he authorized the union president to represent that Harris would take a security job. The union president represented to Harris that "he was working on it, hadn't heard anything yet, but didn't believe 'they' wanted him back."

The witness described his daily duties as an attendance officer. Exhibit R-8, daily assignment sheets for the period December 11, 1985 - January 13, 1987, are a fair representation of what he did as attendance officer.

The Director of Pupil Personnel Services testified that attendance officers were part of his department. In the 1986-87 school year, there were two attendance officers, one of whom was Harris.

There have been many conversations over the years concerning attendance officers and their duties. The witness discussed all facets of attendance problems and how to address them with the former personnel officer and with the present superintendent. The superintendent favored abolishment of the positions as early as 1984. The witness asked for some time before this change was effected because he was new to his position. The function, not the individuals and their performance, was always the focus. Harris and the other attendance officer both worked well and worked hard.

The director analyzed attendance problems. He believed the present system was not adequate. It was basically "a knock-on-the-door, come-to-school" process. The director's concern was more programmatic than budgetary. While his superiors may have had budget concerns, his concerns were addresssed to better meeting the needs of pupils. The director believes the new position better addresses existing problems and the district will get more for its money.

The witness also stated that all members of the child study team staff interact with parents. For the last three and one-half or four years, the attendance officer has not been involved in five-day notice municipal court cases. N.J.S.A. 18A:38-29. In cases of this type, it has been the principal of the school who has prosecuted the case. The two attendance officers merely delivered notices.

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The new social worker position is not replacing a social worker nor assigned to a child study team. The emphasis is on pupil and family services directed at "getting at the attendance problem."

The witness was involved in drafting the job description for the new position (R-6). School social workers presently work with children who have chronic attendance problems. The new position will do the same and in addition will serve as liason with support agencies. The witness requires the present social workers to do virtually all of the specific duties on exhibit R-6.

FINDINGS AND DETERMINATION

The following facts are essentially uncontested and I hereby adopt them as **FINDINGS** in this matter:

1. Joseph S. Harris was a tenured attendance officer in the employ of the New Brunswick Board of Education.

2. Each school district is required to appoint a suitable number of qualified persons to be designated as attendance officers. N.J.S.A. 18A:38-32.

3. On or about April 30, 1987, the petitioner was advised by letter that his services would not be required for the school year 1987-88.

The petitioner adduced considerable testimony concerning the Board's 1986-87 and 1987-88 budgets. Exhibit R-1 establishes that 23 persons were terminated at the end of the 1986-87 school year (R-1). The petitioner and the other attendance officer were among them.

The superintendent's testimony establishes that attendance officer duties are being performed on a less than full-time basis by various persons at the school level. The superintendent recommended that the petitioner and the other attendance officer not be renewed for the 1987-88 school year because he wanted the position to take effect. The new social worker-attendance officer position was not approved by the Board of Education until September 15, 1987 (R-3) and was not advertised until October 4, 1987 (R-5). The

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position was not posted in the district until October 26, 1987 (R-14) and an individual was not hired for the position until January 19, 1988 (R-7). The job description for social worker-attendance officer (R-6) had not, as of the date of hearing, been approved by the county superintendent of schools.

The petitioner asserts several arguments. First, that there was no economic necessity for his nonrenewal. Second, that the Board assigned no one to perform attendance officer duties in the 1987-88 school year, a statutory violation. He cites in support Arangio v. Clifton Bd. of Ed., 1978 S.L.D. 207. Last, the petitioner asserts that he was terminated in retaliation for having successfully defended tenure charges barely a month before his notice of termination. An implied question also exists: Were nonrenewed employees, other than the petitioner, rehired by the district and, if so, does this buttress any of the petitioner's claims.

The economic necessity argument is unavailing. I **FIND** no amount of budget surplus excuses or bars attempts to realize economies. Specifically, I **FIND** that the Board proposed to replace two attendance officer positions, fully funded by the Board at approximately $35,000 plus benefits per year, and replaced them with one social worker-attendance officer at an approximate cost of $25,000 plus benefits per year, only half of which will be paid by the Board, the other half coming from other sources.

The credible testimony concerning advantages of the new position over the former positions, coupled with the economic evidence, defeats the petitioner's argument. I **CONCLUDE** that the petitioner has made no showing of bias, caprice or unreasonableness on this issue.

N.J.S.A. 18A:38-32 requires boards of education to appoint a suitable number of qualified persons to be designated as attendance officers. Nothing in the stature requires that these persons devote full time to their duties. Thus, as is a common occurrence, a board may combine attendance officer duties with other duties. Indeed, the new social worker-attendance officer position is, in a sense, just such a combination. It is important that the duties be performed, not whether they be the sole duties or some of the duties of a given person. The record, however, does establish that the Board failed timely to secure the approval of the county superintendent of schools of the new job title. The New Brunswick Board of Education is **DIRECTED**, if it has not done so already, to submit the

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job description forthwith to the Middlesex County Superintendent of Schools for her approval and, if any, suggestions.

Under Arangio, above, I **CONCLUDE** that this lapse is not fatal to establishment of the new position. In that case, the board reassigned attendance officer duties to social workers in September but did not approve the new job description until April of the following year. The Commissioner stated:

> To hold that the Board's action in this regard is fatal to its attempt to consolidate and reorganize its staff, in the Commissioner's judgment, would be placing form over substance.

1978 S.L.D. at 211. The Commissioner also instructed the board to preserve Arangio's tenure and seniority rights to the position of attendance officer by placing his name on a preferred eligibility list for reemployment to that position in the event the position was recreated in the future. Id.

The petitioner also claims he was terminated in retaliation for having successfully defended tenure charges against him. The New Jersey Supreme Court has recently discussed the elements of a retaliatory discharge. In Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 193, the Court stated in a footnote:

> Under federal employment discrimination law, a retaliatory discharge for engaging in a "protected activity" of pursuing an employment discrimination claim is in itself a discriminatory discharge. Wrighten v. Metropolitan Hosps., Inc., 72 F. 2d 1346, 1354 (9th Cir. 1984) (citing 42 U.S.C.A. 2000e-3); See also, Gemmell v. Meese, 655 F. Supp. 577, 583 (E.D.Pa. 1986) ("to prove her retaliation claim, plaintiff has the burden of proving (1) that she engaged in protected activity, which was known by the alleged retaliator; (2) that an adverse action was taken against her; and (3) that there was a causal connection between the protected activity and the retaliation. (citation omitted). If plaintiff can establish a prima facia case, 'the burden of production shifts to the defendant employer to articulate some legitimate, nonretaliatory reason for the adverse action.'" (quoting Wrighten, supra, 726 F. 2nd at 1354).)

The petitioner claims he has established a prima facia case of retaliatory discharge for his successful defense of the tenure charges. I **FIND** nothing in the record to support the claim. It is true that Harris successfully defended against tenure charges.

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It is true that Harris, and 22 others, were nonrenewed at the end of the 1986-87 school year. Importantly, what is not here is "a causal connection between the protected activity and the retaliation." Other than the petitioner's assertions, I **FIND** no evidence of that connection and **CONCLUDE** that the petitioner has failed to support the charge.

Concerning the question of whether nonrenewed persons had found employment in the district for 1987-88, I directed the district personnel officer to submit through counsel a list of all persons terminated by the Board's action of April 28, 1987, indicating whether tenured or nontenured, rehired or not rehired, and if rehired, the position assumed. The Board filed the list within the week.

Eight of the 23 persons, including the petitioner, were not rehired. Of those eight persons, three persons including the two former attendance officers and an industrial arts teacher were tenured at the time of the reduction in force. Of the 15 persons who were rehired, three were rehired because the district enrolled a greater number of classified students than anticipated, three were hired in positions other than the positions from which they had been reduced in force, one was rehired because federal funds became available and the balance were rehired to fill vacant positions.

I can **FIND** nothing here to support any of the petitioner's claims. He and 22 other persons were reduced in force. He and seven of those other persons were not rehired. The persons who were rehired were rehired within the scope of their certifications. There exists no certification for the school attendance officer position. Therefore, I **CONLCUDE** that the only relief to which the petitioner is entitled is that he be placed on a preferred eligibility list for the position of attendance officer should that position be recreated by the Board in the future. N.J.S.A. 18A:28-12.

In consideration of the foregoing, I **CONCLUDE** that the petitioner has not carried the burden of persuasion as to any of the charges brought in his petition of appeal. Accordingly, I **ORDER** the petition dismissed with prejudice.

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This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

15 APRIL 1988
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

4-18-88
DATE

Seymour Ellis
DEPARTMENT OF EDUCATION

Mailed To Parties:

APR 20 1988
DATE

Ronald L. Lee
OFFICE OF ADMINISTRATIVE LAW

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JOSEPH HARRIS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed.

Petitioner filed timely exceptions pursuant to the provisions of N.J.A.C. 1:1-18.4. Petitioner relies on his post-hearing brief as exceptions to the initial decision. Said submission is incorporated herein by reference. Mr. Harris adds the following.

Petitioner strongly excepts to the ALJ's findings in this matter. He contends that the record is clear that the Board did not abolish the position of attendance officer and create a new position or assign the duties to existing positions. Instead, the Board assigned some of the attendance officer duties to other district employees, without attempting to obtain approval from the Commissioner, in violation of N.J.S.A. 18A:38-32. In January 1988 (R-7) the Board hired someone to act as attendance officer/social worker effective March 29, 1988, claims petitioner. "Again no approval of the Commissioner or the County Superintendent was obtained. We thus have no one effectively acting as attendance officer in an urban city school district for seven months in violation of the statutory mandate that a City School District have an attendance officer, yet the ALJ sustains the Board." (Exceptions, at p. 1)

Further, petitioner avers, the ALJ "ignore (sic) Harris' testimony that he was told that the Central Administration would never let him return. Petitioner asserts that this statement was in retaliation for his having successfully defended the tenure charge. The ALJ glosses over this." (Exceptions, at p. 1)

Petitioner urges the Commissioner reinstate him with full back pay and emoluments of office.

Having carefully conducted an independent review of the instant matter which, it is noted, does not include transcripts of the hearing held below, the Commissioner affirms the initial decision for the reasons stated therein.

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Petitioner proffers no new arguments in his exceptions. Those arguments advanced in his post-hearing submission were addressed fully by the ALJ. The Commissioner would add only that, without the transcript of the hearing below, he will rely on those credibility determinations established by the ALJ in arriving at his conclusions of fact. Thus, the Commissioner dismisses the contention of petitioner made again in exceptions that the ALJ glossed over his contention that "he was told that the Central Administration would never let him return" (Exceptions, at p. 1) as a basis for suggesting retaliation was taken against him for having successfully defended against tenure charges.

Further, the Commissioner finds no basis for distinguishing this matter from Arangio v. Clifton Bd. of Ed., 1978 S.L.D. 707 on the basis petitioner suggests, that is, that no one has assumed the duties of attendance officer since petitioner was notified in April 1987 that his services were no longer required. The record establishes that in January 1988 the Board did, in fact, hire someone to act as attendance officer/social worker effective March 20, 1988 (R-7) albeit without the County Superintendent's approval. Thus, the fact pattern in Arangio, supra, is markedly similar to the instant matter, as noted by the ALJ in the initial decision, ante.

Accordingly, the Commissioner adopts as his own the initial decision rendered in this matter for the reasons expressed therein. Consequently, petitioner has not carried the burden of persuasion as to any of the charges brought in this Petition of Appeal. The matter is therefore dismissed with prejudice.

Notwithstanding this conclusion, the New Brunswick Board of Education is hereby directed to submit the job description in question herein to the Middlesex County Superintendent of Schools for her approval and for any suggestions in establishing a proper job title and duties for this position.

COMMISSIONER OF EDUCATION

May 25, 1988

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JOSEPH S. HARRIS,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT-RESPONDENT,	:	
	:	

Decided by the Commissioner of Education, May 25, 1988

For the Petitioner-Appellant, Klausner, Hunter & Oxfeld
(Stephen E. Klausner, Esq., of Counsel)

For the Respondent-Respondent, Ralph T. Stanzione, Esq.

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

November 1, 1988

Pending N.J. Superior Court

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 174-87
AGENCY DKT. NO. 2-1/87

MARGARET SPANO,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF JACKSON, OCEAN COUNTY, AND THE NEW JERSEY DEPARTMENT OF EDUCATION,
Respondents.

Mary Jane Cullen, Esq., and **Richard A. Friedman**, Esq., for petitioner (Ruhlman, Butrym and Friedman, attorneys)

James P. Courtney, Jr., Esq., for respondent Board of Education of Jackson Township (Russo, Courtney, Foster, Secare, Tassini & Ford, attorneys)

Arlene Goldfus Lutz, Deputy Attorney General, for respondent Department of Education (W. Cary Edwards, Attorney General of New Jersey, attorney)

Record Closed: March 7, 1988 Decided: April 19, 1988

BEFORE **RICHARD J. MURPHY**, ALJ:

Petitioner, Margaret Spano, refuses for religious reasons to subject herself to a Mantoux intradermal tuberculin test required of teachers every three years under N.J.A.C. 6:29-4.2 and she has been suspended by the Jackson Township Board of Education as a result. On October 7, 1987, I granted the respondent's motion for summary decision as to Spano's equal protection claim, but denied that motion as to her First Amendment religious claim pending further proceedings to resolve the factual issue of whether the Mantoux test is the least restrictive and intrusive means available to effectuate the

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compelling public interest in detecting tuberculosis among Jackson Township students and staff. A hearing was held on December 21, 1987, and post-hearing briefs were submitted by the petitioner on January 27, 1988, and by the respondent Department of Education on February 29, 1988. The record remained open until March 7, 1988, to allow the petitioner an opportunity to reply. This opinion rejects petitioner's constitutional challenge to the validity of the tuberculosis skin testing regulation. N.J.A.C. 6:29-4.2.

FACTS

The background facts of petitioner's employment and her religious reasons for refusing to undergo the Mantoux test are set forth in the attached partial summary decision and are not at issue here. The factual hearing on December 21, 1987, focused exclusively on whether the Mantoux test is the constitutionally least restrictive or intrusive means of carrying out the compelling public interest of detecting and preventing tuberculosis.

The regulation in question provides that:

> (a) The following are rules of the State Department of Education concerning testing for tuberculosis infection by district boards of education for implementation of N.J.S.A. 18A:16-2 and 40-16.[1]
>
> 1. The Mantoux intradermal tuberculin test using five T.U. (Tuberculin Units) of PPD tuberculin shall be the only skin test used to detect evidence of tuberculosis infection in pupils and employees.
>
> 2. The only pupils who shall be tested are those in grades and schools identified and/or under circumstances specified by the State Department of Health based upon the high incidence of tuberculosis or reactor rates in the communities or population groups concerned.

---

[1] N.J.S.A. 18A:16-2 empowers boards of education to require employees to undergo physical examinations, including laboratory tests. The boards are also required to periodically determine the presence or absence of tuberculosis infection in any or all pupils by N.J.S.A. 18A:40-16.

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> 3. In every school district a Mantoux intradermal tuberculin test shall be given to all employees (full-time and part-time), all student teachers, and other persons who have contact with pupils. If the Mantoux intradermal tuberculin test shows less than 10 mm of induration, the above persons shall be retested with a Mantoux intradermal tuberculin test every three years.
>
> 4. Any pupil or employee shall be exempt from these requirements upon presentation of documentation of a prior significant reaction evidenced by vesiculation following the administration of a multiple puncture tuberculin test or a significant reaction (that is, 10 mm or more of induration) following a Mantoux intradermal tuberculin test with five tuberculin units of stabilized PPD tuberculin. Any other exemption from these requirements shall be because of medical contraindictions subject to review by the medical inspector [emphasis added].

N.J.A.C. 6:29-4.2.

A pamphlet prepared by the American Thoracic Society and the medical section of the American Lung Association (R-1), and released jointly with the Centers for Disease Control in September 1981, states that:

> The tuberculin skin test has been the traditional method of diagnosing infection with Mycobacterium tuberculosis. Although currently available tuberculin skin tests are not 100% sensitive and specific for detection of infection with M. tuberculosis, no better diagnostic methods have yet been devised. Intelligent interpretation of skin test results requires a knowledge of the antigen used (tuberculin), the immunologic basis for the reaction to this antigen, the technique(s) of administering and reading the test, and the results of epidemiologic and clinical experience with the test [emphasis added].

R-1 at 1.

The Mantoux tuberculin skin test involves an injection into the skin layers (intracutaneous) of a purified protein derivative of the tubercle bacillus, which is no longer a living organism. After the injection, which must be made with some skill and care for accurate results, the presence or absence of tuberculosis infection is assessed and determined through the subject's skin reaction. The fact that an individual has been

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infected or exposed to the tubercle bacillus does not mean that that person has, or will, develop the symptoms of tuberculosis and thereby become infectious to others. When these symptoms develop, which may be weeks or months after infection or without any intervening time period, tuberculosis can be detected by a physician taking a medical history, giving a physical exam, and administering confirmatory laboratory tests such as X-rays or sputum examination.

Petitioner attacked the reliability and efficacy of the Mantoux test through the testimony of Dr. Robert Mendelsohn, a Chicago physician qualified as an expert in communicable diseases. The respondent Department of Education relied on Dr. Mary J. Teeter, D.O., Assistant Director of the Communicable Diseases Epidemiology Unit at the New Jersey State Department of Health. The doctors agreed that infection occurs when the tubercle bacillus enters the human body, commonly through droplets in the air let loose by a person with tuberculosis symptoms, and then establishes itself through a lesion or some other site often in the lungs, where, in healthy human beings, it would be attacked and contained by the immune system. The doctors did not dispute that, at this stage of infection, infected persons could not communicate tuberculosis to others in that they had not yet developed the symptoms by which the disease is communicated. There was also no dispute over the assertion that those symptoms might occur either within several weeks after infection or without any delay. The doctors concurred that infection by the tubercle bacillus without the symptoms of the disease present could not be detected by the clinical methods of patient history, physical examination and confirming laboratory tests such as X-rays or a sputum test. There is no dispute as to the above facts, and I so **FIND.**

There was much dispute as to the reliability and efficacy of the Mantoux test in detecting infection, as opposed to the infectious or communicable stage of the disease. Dr. Mendelsohn was of the opinion that the Mantoux test was hard to administer, difficult to interpret, and subject to a number of variables including the presence of other disease and the condition of the subject. He testified that it resulted in a false negative result in approximately 30 percent of tests and a false positive for some 11 percent (T34:16-17). Because of these factors, Dr. Mendelsohn believes that the Mantoux test cannot reliably detect an infection and claimed that the trend in the medical community was away from its widespread use as a uniform screening device (T34:16-17; T58; T71-74). Dr. Mendelsohn also noted that the Mantoux test could not be given on a frequent basis

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without an unacceptable level of erroneous results. The pamphlet of the American Thoracic Society also recognizes that repeated testing can throw off the test results (R-1 at 7). The pamphlet notes that not all persons reacting to the injection are infected with the tubercle bacilli and that some infected persons might not be detected by the Mantoux test because of a number of factors including improper administration or interpretation, the age of the person tested, or coexisting diseases (R-1 at 3, 5-7). Notwithstanding these possible problems, the American Thoracic Society states that the Mantoux test may be used as the initial step in screening apparently well persons for tuberculous disease (R-1 at 6). Rather than use the Mantoux test, Dr. Mendelsohn prefers to rely on the clinical method of patient history, physical examination and sputum or X-ray laboratory tests to confirm the presence of infectious disease. He concedes that these methods cannot detect infection and notes that a person with tuberculosis "can go from being healthy to being very sick ... in a few weeks" (T108:7-13). He notes that his method can be used more frequently to detect the presence of tuberculosis that has advanced to the infectious stage (T70).

Dr. Mary Teeter, testifying for the Department of Education, was of the opinion that the Mantoux test, if properly administered and interpreted, could detect the presence of infection with the tubercle bacillus and notes that the test is endorsed by the American Thoracic Society, American Lung Association and Centers for Disease Control in their pamphlet on tuberculin skin testing (R-1). She acknowledged that the Mantoux test was not perfect or foolproof and could result in a five percent false negative reading if improperly administered or subject to other variables (T130:22 to 25; T131-32; T151).

On the basis of the expert testimony introduced as well as the pamphlet of the American Thoracic Society, I make the following findings of fact:

1. That a teacher infected with the tubercle bacillus can develop symptoms of tuberculosis within several weeks of infection and thereby become infectious and then communicate the disease to other persons, such as students, with whom she has close personal contact. There is no dispute on this point.

2. That the clinical method of medical history, followed by a physical examination and confirming laboratory test of sputum and X-ray, can

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detect the disease of tuberculosis in the infectious stage but cannot detect the infection before the onset of overt symptoms of tuberculosis. The medical experts do not disagree on this point either.

3. That the Mantoux test is capable of detecting infection with the tubercle bacillus before the infected individual becomes infectious through developing symptoms that may spread the disease to others; further, that the Mantoux test may yield false positive or false negative results of up to 30% if it is improperly administered or interpreted, given to individuals with a coexisting disease, or in a number of other circumstances.

Although Dr. Mendelsohn cites the possibility of false positive and negative results, and therefore questions the reliability and efficacy of the Mantoux test, he does not dispute that the test is capable of detecting the infection before it reaches the infectious or contagious stage. He concedes that the Mantoux test is effective overall in 70 percent of all tests, although it is difficult to predict its accuracy in any given case (T34:16-17). Because Dr. Mendelsohn's opinion is based on possible false positives and negatives, and not on the conclusion that the Mantoux test is incapable of detecting infection, I find that the state has shown by a preponderance of the evidence that the Mantoux test can, when properly given and read, detect infection. This finding is supported by the testimony of Dr. Teeter and by the pamphlet of the American Thoracic Society.

ISSUE

The sole issue to be determined here is whether the Mantoux test is the constitutionally least restrictive and intrusive means available to effectuate the compelling public interest in detecting tuberculosis infection among Jackson Township teachers.

ARGUMENTS AND CONCLUSIONS OF LAW

Petitioner's basic argument is that the compelling State interest underlying testing for tuberculosis is to detect persons with what she describes as the "secondary" or infectious stage of tuberculosis, which is communicable and poses an immediate financial threat to public school students. Spano contends that there is no compelling State

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interest in testing for persons who are infected with TB but not infectious because they pose no significant risk to other persons. Since the presence of tuberculosis symptoms which make an infected individual infectious can be detected by a physical examination and confirming X-ray and sputum lab tests without resorting to the injection of the Mantoux materials, the petitioner argues that the Mantoux test is neither necessary nor the least intrusive means for detecting the infectious stage of tuberculosis. The petitioner also argues that, even if the compelling State interest is to detect "primary tuberculosis" or infection and prevent its progression to "secondary tuberculosis" or "disease" (brief at page 14), the State has failed to bear its burden of proving that there is no less intrusive method than the Mantoux test, which she characterizes as less reliable and effective than the traditional method of medical history, physical examination and confirming laboratory tests that can be administered more frequently than the Mantoux test and with better results.

The Department of Education, joined by the Jackson Township Board of Education, responds that the compelling State interest advanced by the regulation is the control of tuberculosis, which requires the detection of tuberculosis infection. The Mantoux test, the State argues, is both necessary and the least restrictive and intrusive means of detecting infection which cannot, in the absence of symptoms of the disease, be detected by a physical examination and confirming X-ray or sputum laboratory test. The Department also argues that only the Mantoux test screens for the presence of tuberculosis infection to find potential transmitters who may be treated to prevent the disease from progressing and spreading. The Mantoux test is also necessary, the Department claims, to effectuate the compelling State interest in controlling tuberculosis because it helps identify areas of high prevalence of infection and discloses potential cases, so that health resources can be more effectively and precisely applied.

The first part of the petitioner's argument attempts to limit the compelling State interest to the detection and prevention of so-called "secondary TB," which is infectious and communicable and thus poses an immediate and substantial threat to public school students. Given the fact that a teacher infected with the tubercle bacillus can, in a matter of weeks, develop symptoms of the disease and thereby infect students and others, the petitioner's distinction between "primary" tuberculosis involving a mere infection and the "secondary" or symptomatic and communicable stage is artificial and disregards the sometimes quickly progressing path of the infection. The compelling State

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interest in detecting, containing and preventing tuberculosis among teachers and students need not wait until infection has grown full blown into deadly and communicable disease. See, Mountain Lakes Board of Education v. Maas, 56 N.J. Super. 245 (App. Div. 1959). The State's interest in detecting the infection and preventing or controlling its descent into communicable disease is no less compelling than the public interest in identifying and curing the contagious.

The issue to be addressed here is whether the Mantoux test is necessary to effectuate the compelling State interest in detecting infection with tuberculosis among teachers and whether it is the means that involves the least restriction and intrusion upon this teacher's constitutionally protected religious beliefs. Once it is shown that a State regulation intrudes upon a person's religious beliefs, the State has the burden of showing that there is an overriding need to do so and that there is no other way than the means selected to satisfy that need. See, Valent v. New Jersey State Board of Education, et als., 114 N.J. Super. 63, 78-79 (Chan. Div. 1971). None of the cases cited by the petitioner for the proposition that compelling State interest must be related to a focused and substantial harm deal with questions of disease and public health.[2] In areas involving public health such as vaccinations or blood transfusions contrary to religious beliefs, "the practice of such beliefs is not immune from a modicum of governmental restraint where the governmental interest is compelling." See, Essex County Welfare Division v. Harris, 189 N.J. Super. 479, 482 (App. Div. 1983) (see cases cited at 482 including Mountain Lakes Board of Education v. Mass.) In Harris, the Appellant Division included that a Christian Scientist could be compelled to give blood for an HLA (human leucocyte antigen) and stated that while the First Amendment "accords an absolute freedom to believe, it does not accord an absolute freedom to act or to fail to act." 189 N.J. Super. at 482.

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[2] See, Cantwell v. Connecticut, 310 U.S. 296 (1940) (right of Jehovah's Witnesses to go house to house playing anti-Catholic records); Sherbert v. Verner, 374 U.S. 398 (1963) (finding that a Seventh-Day Adventist could not be denied unemployment compensation benefits for refusing to work on a Saturday Sabbath); San Francisco County Democratic Central Committee v. Eu, 56 U.S.L.W. 2121 (9th CA. August 18, 1987) (striking down State law prohibiting endorsements by central committees of political parties); Schneider v. Town of Irvington, 308 U.S. 147 (1939) (reversing conviction of Jehovah's Witnesses for distributing circulars door to door); Kusper v. Pontikes, 414 U.S. 51 (1973) (concerning switchover voting in political party primary collections); Prince v. Massachusetts, 321 U.S. 158 (1944) (upholding child employment restrictions on sale of religious publications); Wisconsin v. Yoder, 406 U.S. 205 (1972) (exempting the Amish from compulsory education).

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The facts in this case demonstrate that the Mantoux test is necessary to detect the presence of infection with the tubercle bacillus, which cannot be detected by the method espoused by the petitioner: medical history, physical examination, and confirming X-ray or sputum lab test. Although this traditional method can detect the presence of tuberculosis which has progressed from infection to infectious disease, it cannot detect the infection alone and thus cannot be considered a less restrictive or intrusive means. I so **CONCLUDE.**

I further **CONCLUDE** that the imperfections and limitations of the Mantoux tuberculin skin test do not render it ineffective and unnecessary to achieving the compelling State interest in detecting infection in teachers. Even the expert witness for the petitioner conceded that the Mantoux test was reliable at least 70 percent of the time, although he could not predict this reliability in any given case. In terms of achieving the compelling State interest in detecting tuberculosis infection and thereby monitoring its presence among teachers, the traditional clinical exam method proposed by the petitioner, which cannot detect the infection before it advances into contagious disease, is not a more reliable or effective means. At present, the Mantoux test must be considered the least restrictive and intrusive means because it is the only means advanced by the parties capable of detecting infection, albeit with less than perfect precision, before it advances to the point of being a communicable disease that can be transmitted to students and other teaching staff. The State need not wait for an epidemic before it tries to detect and control disease.

ORDER

On the basis of the above findings of fact and conclusions of law, it is **ORDERED** that the petition of Margaret Spano challenging the constitutionality of the regulation requiring her to undergo a Mantoux intradermal tuberculin test is **DISMISSED.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

April 19, 1988
DATE

Richard J. Murphy
RICHARD J. MURPHY, ALJ

Receipt Acknowledged:

April 19, 1988
DATE

Seymour Cooperman
DEPARTMENT OF EDUCATION

Mailed To Parties:

April 22, 1988
DATE

OFFICE OF ADMINISTRATIVE LAW

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MARGARET SPANO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF JACKSON, OCEAN COUNTY, AND THE NEW JERSEY DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENTS.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner filed timely exceptions pursuant to N.J.A.C. 1:1-18.4, which rely on her original letter brief dated January 27, 1988, as exceptions to the initial decision. Said brief is incorporated herein by reference. Further, both the State and the Board filed timely reply exceptions.

Petitioner's exceptions summarize her position by stating that "The Mantoux Tuberculin Test is not 'the least restrictive/intrusive means to effectuate the public interest in detecting tuberculosis and holding it at bay,' and that the method offered by Petitioner herein is a less intrusive means which will accomplish the State's goal." (Exceptions, at p. 1)

The State's reply exceptions rely on its post-hearing brief in support of the ALJ's decision, which is likewise incorporated herein by reference. The State adds in support of the ALJ's decision:

> Initially, it should be noted that in a previous partial decision Judge Murphy found that the health of school children was a compelling state interest and thus paramount to petitioner's First Amendment claims, provided that the means used to achieve that interest, the Mantoux test, was the least intrusive method for detecting the presence of tuberculosis infection. After testmony (sic) of experts, the ALJ concluded that the Mantoux test was the only diagnostic means available, and thus the least intrusive, for achieving the state's goal of detecting tuberculosis infection.
> (State's Reply Exceptions, at p. 1)

The State urges affirmance of the initial decision.

The Board joins with the State in supporting the decision of the ALJ, suggesting that "it would be in the best interest of justice as well as the students, administrators and employees of the

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Board of Education that the well-reasoned decision be affirmed." (Board's Reply Exceptions, at p. 1)

Upon his careful and independent review of the instant matter, the Commissioner dismisses the instant Petition of Appeal for the reasons stated below.

Initially, the Commissioner finds that the ALJ miscasts the issue that is before the Commissioner. To crystallize exactly what the issue is, the Commissioner must clarify what issues are not before him in this case.

Foremost, it must be stated that the Appellate Division of the Superior Court of New Jersey, not the Commissioner, is embued with authority to consider challenges to the validity of the State Board of Education regulations. See R. 2:2-3(a)(2). In claiming that the Commissioner has the authority to hear this matter, petitioner and the ALJ, in his Order - Partial Summary Decision, dated October 7, 1987, rely on the exception carved out of R. 2:2-3(a)(2) which states that

> ***review pursuant to this subparagraph shall not be maintainable so long as there is available a right of review before any administrative agency or officer, unless the interest of justice requires otherwise***.

The ALJ determined that "Spano's petition presents the sort of 'fact sensitive' case where the constitutional questions are inextricably linked to questions of fact in need of administrative resolution. See, Abbott v. Burke.***" (Order, at p. 6) The ALJ granted petitioner's motion to amend her Petition of Appeal to include a constitutional challenge to the validity of N.J.A.C. 6:29-4.2, both on the basis of the First Amendment and on the basis of equal protection. He thereafter granted respondents' motion for summary decision as to Ms. Spano's equal protection claim, but denied that motion as to her First Amendment religious claim pending further proceeding to resolve the factual issue of "whether the Mantoux test is the constitutionally least restrictive and intrusive means available to effectuate the compelling public interest in detecting tuberculosis infection among Jackson Township teachers." (Initial Decision, ante)

While an administrative agency may develop a factual record in assisting the Appellate Division to determine the constitutional validity of the agency's rule, the factual record to be developed by that agency must lie within its own area of expertise. In the instant matter, the factual issue, stated ante, which the ALJ and petitioner would seek to develop is not within the Department of Education's expertise, but rather lies within the purview of the Department of Health. N.J.A.C. 6:29-4.2 was developed in response to the Department of Health's regulations and, thus, any challenge to whether the Mantoux test is least restrictive would have to be heard by that agency, not by the Department of Education.

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Accordingly, the Commissioner dismisses those portions of the instant petition challenging the constitutional validity of N.J.A.C. 6:29-4.2 as such challenge does not lie within his jurisdiction.

However, petitioner has properly raised before the Commissioner the issue of whether she may be granted an exemption from application of N.J.A.C. 6:29-4.2. Guidance has already been provided on the constitutional questions underlying such application for exemption. The matter has been decided by way of Declaratory Judgment in the case entitled In the Matter of the Joint Application of Kathleen Grigas and the Board of Education of the East Windsor Regional School District, 1983 S.L.D. 775. Therein the Commissioner held:

> In the instant matter Grigas is seeking the exemption from taking the Mantoux test which identifies both employees and pupils who may or may not show a positive reaction as evidence of the tuberculosis organisms present within their bodies.
>
> In the Commissioner's judgment the Mantoux test does not fall within the statutory or regulatory reasons for exemptions for conscientious objectors whether they are pupils or Board employees.
>
> Local public school district boards of education are required to comply with those laws and regulations of both the Department of Education and the Department of Health in an effort to determine whether or not there is evidence of communicable disease among their employees as well as the pupils in the public school districts of this State.
>
> Without the authority to at least require both Board employees and pupils of a public school district to be screened through a preliminary testing program for evidence of communicable diseases, the laws and regulations administered by the Department of Education, as well as the Department of Health, would be severely compromised to the detriment of the pupils attending our public schools as well as those board employees with whom they come in daily contact.
>
> In conclusion, therefore, the Commissioner finds and declares that mandatory immunization is not at issue herein. Such appeals properly come under the jurisdiction of the Department of Health. However, it is clear from a reading of both bodies of law, N.J.S.A. 18A:1-1 et seq. and

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N.J.S.A. 26:1 and 26:1A et seq., as well as the regulations pertinent thereto, in pari materia, Grigas may not claim exemption as a conscientious objector to the Mantoux test for tuberculosis since it is a screening test for evidence of a communicable disease. The Board is within its lawful authority to require that Grigas submit to the Mantoux Test for evidence of tuberculosis as a condition for her continued employment as a teaching staff member in the East Windsor Regional High School District. The Commissioner so holds.

Accordingly, this Declaratory Ruling is hereby issued affirming the Board's authority to deny exemption to Grigas from taking the Mantoux Test for Tuberculosis on the grounds that she claims to be a conscientious objector. (at 782-783)

Thus, the Commissioner has previously held that religious exemption for innoculation does not apply to the Mantoux test for tuberculosis because the Mantoux test is merely a screening device, for which there is a compelling need, overriding claims for exemption on the basis of religious beliefs.

Accordingly, the Board herein is within its authority to deny exemption to petitioner herein from taking the Mantoux test for tuberculosis on the basis of religious belief.

Consequently, the instant Petition of Appeal is dismissed with prejudice. The initial decision rendered by the Office of Administrative Law is hereby rejected, as is the Order - Partial Summary Decision of the Office of Administrative Law, dated October 7, 1987.

COMMISSIONER OF EDUCATION

June 1, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7152-86
AGENCY DKT. NO. 338-9/86

BOARD OF EDUCATION OF ABSECON,
Petitioner,
v.
BOARD OF EDUCATION OF PLEASANTVILLE, ATLANTIC COUNTY,
Respondent.

Cynthia P. Liebling, Esq., for petitioner (Golden, Shore & Zahn, attorneys)

James L. Jackson, Esq., for respondent

Record Closed: March 14, 1988 Decided: April 6, 1988

BEFORE **NAOMI DOWER-LA BASTILLE,** ALJ:

The Board of Education of Absecon (Absecon) seeks to sever its high school sending-receiving relationship with the Board of Education of Pleasantville (Pleasantville). On October 22, 1986, the Commissioner of Education transmitted the matter to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. After a prehearing, the case was placed on the inactive list to permit completion of a feasibility study which, in fact, was not completed. After another prehearing, respondent moved for a summary decision and the record closed on March 14, 1988, when an oral argument was held by telephone.

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The issues should be viewed in the context of certain undisputed facts. Absecon's students are predominantly white. Pleasantville students are predominantly black. Pleasantville is undergoing Level III monitoring. Absecon sends between 20 and 30 students to Pleasantville High School, which serves about 700 students. About 350 Absecon students attend Holy Spirit High School (a private school).

Absecon filed a petition on September 29, 1986, seeking approval to send its children elsewhere, but named no specific district as the new receiver. On November 24, 1986, an amendment to N.J.S.A. 18A:38-13 became effective. That statute now reads:

> 18A:38-13. Change of designation or allocation and apportionment of pupils to high schools
>
> No such designation of a high school or high schools and no such allocation or apportionment of pupils thereto, heretofore or hereafter made pursuant to law shall be changed or withdrawn, nor shall a district having such a designated high school refuse to continue to receive high school pupils from such sending district except upon application made to and approved by the commissioner. Prior to submitting an application the district seeking to sever the relationship shall prepare and submit a feasibility study considering the educational and financial implications for the sending and receiving districts, the impact on the quality of education received by pupils in each of the districts, and the effect on the racial composition of the pupil populations of each of the districts. The commissioner shall make equitable determinations based upon consideration of all the circumstances, including the educational and financial implications for the affected districts, the impact on the quality of education received by pupils and the effect on the racial composition of the pupil population of the districts. The commissioner shall grant the requested change in designation or allocation if no substantial negative impact will result therefrom.
>
> Amended by L. 1986, c. 156, §1, eff. Nov. 24, 1986.

A prehearing scheduled for December 8, 1986 was adjourned due to an attorney scheduling conflict. By January 6, 1987, the amended statute had been in effect for over a month and the parties stipulated that it would be applicable to the case. The prehearing order directed that a feasibility study and discovery proceed concurrently, but the parties agreed to admit the case to the inactive list because of the time required to complete a feasibility study.

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During the spring of 1987, Absecon sent respondent five sets of interrogatories comprising hundreds of questions and requests to produce documents. By June, Absecon complained that it was not receiving discovery and that it would not be possible to perform a feasibility study without the answers to all the questions and production of all the documents sought in discovery. Respondent then filed a petition for declaratory judgment with the Commissioner which it hoped would result in an interpretation of the new statute to require that a feasibility study must be submitted to the Commissioner prior to the filing of a contested case and prior to the discovery process. The Commissioner declined to issue a declaratory judgment on grounds that my prehearing order, which addressed the disputed procedure, had not been appealed.

In response to a letter from Absecon counsel on July 17, I directed Absecon to file an affidavit on what progress had been made on the feasibility study since I interpreted the statute to mean that such a study should be submitted to the Commissioner before the case proceeded and had granted the order of inactivity so that this could be accomplished. Absecon filed an affidavit reiterating that the study could not proceed without Pleasantville's responses to discovery demands and on-site visits. On August 10, I advised the parties that I had reviewed the discovery requests and found that a substantial number of them were not proper. Absecon was endeavoring to force Pleasantville, in the guise of discovery, to gather the data which Absecon's consultants needed for a study. I then instructed the parties at great length of the manner in which various kinds of discovery requests should be dealt with and warned Absecon that it must pay all reasonable expenses caused by the requests under N.J.A.C. 1:1-10.3 and that counsel should therefore advise the Absecon Board of the magnitude of the expenses which it would incur if it pursued responses. Absecon claimed it should not be required to pay.

Absecon filed a motion to compel. On August 13, I again wrote to the parties and set forth additional principles to be applied in determining responses to discovery. I reiterated advice that counsel should consult together and with their clients concerning costs and come to agreements on discoverable materials based on the numerous guidelines and examples I had given. On September 3, 1987, I held a telephone conference at which time it became clear that counsel for Absecon would not accept the guidelines, directives, and examples I had given to the parties to enable them to determine the disputes on interrogatories on a question-by-question basis. Absecon counsel continued to insist that all the data should be supplied by Pleasantville at respondent's expense.

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I scheduled an in-person motion hearing and prehearing for October 16, which was adjourned to November 18 due to the illness of counsel. On November 18, 1987, I commenced hearing the motion to compel for about four hours, until counsel were compelled to leave due to other commitments. At that hearing, I was able to decide what should be provided in response to the first set of interrogatories (96 questions), the second set (38 questions), and the demand for production of the first 57 documents out of 159. Respondent was to supply answers to the first set of interrogatories by December 1 and the second set by December 15, plus the documents (up to number 57) as determined, as soon as possible. No time remained on that date to address the fourth set of interrogatories (six questions), the fifth set (four questions) or the remainder of the document production demands (58 to 159).

The burden of discovery was so great that respondent had good cause to attempt a resolution by way of summary decision motion. On the facts generally known, I encouraged counsel to do so.

Pleasantville filed a motion for summary decision on November 12, 1987, with affidavits. Respondent's arguments and facts were straightforward. Pleasantville argued that the change in racial composition of respondent's high school, if Absecon's petition were granted, standing alone, would not only have a substantial negative effect on the respondent, but would constitute State action to implement segregation contrary to both the Federal and State constitutions. Pleasantville also stated that no other school district had agreed to accept Absecon students, and tendered the Atlantic County Superintendent's data on the racial composition of its schools showing that only Atlantic City schools were racially integrated and that all other districts were predominantly white so that sending Absecon's white student population to any other district could only increase the segregation in these prospective receiving districts.

On December 8, Absecon filed a response with numerous exhibits and affidavits. Being unable to controvert the basic facts concerning racial composition of the districts, Absecon argued that there were factual disputes on racial, financial and educational impact which would preclude summary decision, that discovery was incomplete (and presumably might reveal significant factual material), and that Absecon really did have alternative receiving districts. Absecon offered facts to show the maximum effect of withdrawal on respondent's racial mix would be 3.3 to 3.7 percent of

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its school population and that "racial impact" would range from 1 percent to 7 percent in prospective receiving districts.

Due to the volume of Absecon's submissions, Pleasantville asked for and received additional time to respond and did so in January 1988. Pleasantville's affidavit showed that the only "integrated" district in Atlantic County (Atlantic City) had, by resolution, refused to receive Absecon students. Absecon sent an additional submission in February, and asked for oral argument which I at first thought might not be needed. Upon review of the submissions, however, I determined that one jurisdictional fact was not addressed (how the sending/receiving relationship began, which would determine which statute controlled). I was also uncertain of the import of the facts and arguments appearing for the first time in the final submissions and sought an update. Pleasantville had related that regionalization studies were underway and it was unclear what effect this fact had upon the issues, if any. I had also reviewed the discovery record, and asked what discovery had been provided subsequent to my order to compel at hearing in November and what progress had been made on the feasibility study.

On March 14, 1988, an oral argument was held by telephone, and the record closed on that date. The parties advised that some discovery ordered had been provided in December in response to my order, but that it had been held in abeyance subsequently due to the pending motion. As to the feasibility study, Absecon stated that on-site facility visits were needed. Pleasantville stated it had been willing and able to grant visitation. Absecon claimed that it could not arrange visitation by its consultants until all its "discovery" requests had been provided, particularly the document requests (No. 57 to 159) which could not be addressed in November 1987. Absecon argued that its discovery requests in toto were needed to show that Pleasantville could not provide a thorough and efficient (T&E) education to Absecon students. Pleasantville argued that T&E as an issue was irrelevant since the State would alone determine that question in its Level III monitoring. I agreed. The State Board held in Washington Township Bd. of Ed. v. Upper Freehold Reg. Bd. of Ed., OAL DKT. EDU 6014-81, State Board remanding opinion (December 7, 1983), that the issue of whether or not the receiving district provides a T&E education is not an issue, that being an impossible burden for any party.

During oral argument, respondent reiterated its position in its last filed response: it would accept for the purposes of the motion the facts asserted by Absecon on racial composition of the Pleasantville High School. The difference in the parties' initial

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positions on the percentage of whites had been between 2 and 3.7 percent. If Absecon were permitted to withdraw, the difference in the percentage of whites withdrawn would have been the difference between one-third and one-half of the white student population of Pleasantville High. To remove the assertion of material facts in issue, Pleasantville agreed to the Absecon figures and projections (much of the difference is attributable to consideration of 1986-87 versus 1987-1988 school year figures).

At oral argument, I also asked the parties whether they could fairly find any dispute of fact as to what I considered the operative facts on their motion. I discussed the undisputed facts I intended to find to give the parties an opportunity to refute them by adverting to facts in the filed papers. While there were minor discrepancies in numbers and percentages, Pleasantville's agreement to accept the figures on racial composition offered by Absecon permits me to make these findings:

UNDISPUTED MATERIAL OPERATIVE FACTS

1. In the 1986/1987 school year, 93 percent of Absecon's eighth graders but only about 11 percent of Pleasantville's 700 high school students were of the white race.

2. Racial ratios in these schools have been relatively consistent in recent years and no substantial changes are projected for the next five years.

3. Withdrawal of Absecon's students from Pleasantville High would only have about a 3 percent effect on the racial composition of the school.

4. Withdrawing Absecon students would, however, result in reducing the white student population at Pleasantville High by between one-third and one-half. (The difference arises from the fact that the number of white Pleasantville resident students has declined in the most recent year.)

5. Currently, between 20 and 30 Absecon students attend Pleasantville High School and 350 attend Holy Spirit High School.

6. Absecon has no commitment by the Board from any other district to accept its high school students.

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7. Pleasantville High School is currently undergoing a Level III review; all indicators except five were rated as acceptable on September 15, 1987, and on-site preliminary compliance review and program deficiencies review activities began on January 11, 1988. The five indicators were in the elements of attendance and basic skills achievement.

8. If all Absecon students were withdrawn in 1988, Pleasantville would lose about $110,000 in tuition which would be less than 1 percent of its budget.

DISCUSSION AND CONLCUSIONS

The Legislature singles out three specific areas in N.J.S.A. 18A:38-13 among all the factors which should be considered in severing a high school sending-receiving relationship:

1. educational and financial implications for the affected districts;
2. impact on the quality of education received by pupils; and
3. effect on the racial composition of the pupil population of the districts.

Even if all these considerations are favorable to the petitioner, if the respondent shows that the change will have a substantial negative impact, the request shall not be granted. The State Board has given guidance in interpretation of the amended statute. Bd. of Ed. of Township of Cranbury v. Bd. of Ed. of Township of Lawrence, OAL DKT. EDU 8626-82, decided by Commissioner (September 30, 1985), decided by State Board (April 1, 1987). The State Board holds that after a sending district presents an educationally based reason for withdrawal supported by a presentation of facts and some support for a claim of no significant impact on the receiving district, the burden shifts to the receiver to demonstrate that it will suffer significant negative impact. The State Board does not find that the amended statute represents a departure from prior legislative policies, but simply gives further definition to the balance between those policies. The newly stated statutory criteria are the same as those developed in decisional law under the predecessor statute.

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By filing this motion, Pleasantville has taken up the burden of showing significant negative impact which is of so substantial a nature that it cannot be overbalanced by petitioner. Respondent also presents one undisputed fact which demonstrates that Absecon cannot supply the information necessary to make the considerations required by the statute because no district has agreed by official act to accept Absecon students. Absecon argues that the statute requires only a consideration of the effects of a change on petitioner and respondent and not on whatever district might become the receiving district after a severance. I do not agree. The State Board, in Cranbury, held that there has been no change in the factors to be considered. Prior cases have held that the Commissioner was required to weigh all the relevant factors, which include the educational impact, financial impact, facilities considerations and racial impact on all pupils and districts involved. Bd. of Ed. of Township of Washington v. Bd. of Ed. of Upper Freehold Reg. School District, decided by State Board (June 5, 1985), aff'd (N.J. App. Div., September 17, 1986, A-5164-84T1) (unreported). That case turned on whether or not the proposed receiving district was overcrowded. The Cranbury case also considered facts concerning the proposed receiving district. It is not possible to address the legislative concern to prevent unwarranted instability when no other district has agreed to be the receiver and when the new statute requires a five-year commitment from the proposed receiving district (N.J.S.A. 18A:38-13.1). I **CONCLUDE** that Absecon cannot show application of the statutory criteria because it has not presented a resolution officially committing another district to become a receiver for its high school students for the five years subsequent to severance. Parenthetically, any other receiving district in Atlantic County would become more segregated by receiving Absecon students since every other district is over 90 percent white, except Atlantic City, which has officially rejected Absecon as a sending district.

Absecon's argument that proof of delivery of a thorough and efficient education is at issue in this case (and requires an unparalleled burden of discovery) is erroneous. It is true that when respondent filed its answer back in 1986, it used an affirmative statement that it provides a T&E education in that document. The State Board held in Washington (remanding opinion, December 7, 1983) that a petitioner did not have to prove the T&E issue, however. I now **CONCLUDE** that the T&E issue alluded to by respondent initially is surplusage.

One other issue which the statutory criteria sets forth is not essentially in dispute. Respondent did not dispute that the tuition loss to Pleasantville and hence the

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financial impact of change would be minimal. Even if all Absecon students were withdrawn in one year rather than phased out over four years by sending Absecon eighth graders to another school, the impact would at most ($110,000) be less than 1 percent of Pleasantville's budget. Financial impact, as an issue, is thus conceded in favor of Absecon.

Despite my conclusion that Absecon cannot demonstrate the impacts required by N.J.S.A. 18A:38-13, whether before of after amendment, due to its inability to supply a receiver, I do not rest my decision on that determination. Even if all criteria were met by Absecon, there remains the question of substantial negative impact on Pleasantville. Petitioner argues that there is no substantial negative impact and that there are material facts in issue such that summary judgment is precluded under the standards of Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 73-75 (1954). Specifically, petitioner offers an opinion from one of its consultants that the racial impact of a change would be negligible, not significant and not adverse because out of about 700 students at the high school, Pleasantville had only 63 white pupils in 1986-87 and 45 white pupils in 1987-88 (2 percent to 3 percent). Based on these facts, he opined that the loss of 20 or 30 (one-third to one-half of the white students) would be negligible. R. 56(2) states that expert testimony is admissible only if it will assist the trier of fact to understand the evidence or determine a fact in issue. In this case, I need no expert opinion to assist me in forming a conclusion under the statutory standard of "substantial negative impact" with respect to racial impact. If the facts were that Pleasantville High School was 50 percent black and 3 percent of the white students came from Absecon, the circumstances might be otherwise. When the facts are that the Pleasantville High School is 93 percent or more black, and of the white student population, one-third to one-half is from Absecon, no "battle of experts" can contribute to my understanding of the evidence.

In Booker v. Bd. of Ed. of Plainfield, 45 N.J. 161 (1965), our Supreme Court discussed the Commissioner's broad powers to deal with State policy against racial discrimination and segregation in public schools in circumstances where schools within a single district exhibited de facto segregation in proportions as high as 95 percent. The Commissioner had historically taken the position that the continuation or potential creation of a school populated entirely, or nearly so, by negro pupils was stigmatic and resulted in feelings of inferiority with an undesirable effect upon attitudes related to successful learning. The court discussed the landmark Federal cases recognizing this principle (Brown v. Bd. of Ed. of Topeka, Bell v. City of Gary, Barksdale v. Springfield, et

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al.), state cases holding that state boards and commissioners have power to act to alleviate racial imbalance, and the ratios of negro to white school populations which courts have considered as demonstrating racial imbalance. These ratios included 75 percent negro (N.Y., Vetere); 99 percent (N.J., Orange); 98 percent (N.J., Englewood); 95 percent (N.J., Union), and 50 to 90 percent (Barksdale, Federal case).

The Booker court considered the Commissioner and State Board too restrictive in viewing their authority as limited to schools entirely or almost entirely negro. The Booker court noted it had made no attempt to define the precise extent of racial imbalance requiring remedial action. It noted that other courts had declined sociological definitions of a triggering ratio, defined it at 50 percent and defined it as "predominantly or substantailly negro." Id. at 176 to 180. The court concluded that the point may be well above 50 percent but well below 100 percent or nearly 100 percent.

In November 1969, the State Board adopted a statement of policy that segregation of children by race is educationally harmful to all children. Bd. of Ed. of Milltown v. Bd. of Ed. of New Brunswick, 1975 S.L.D. 445, 452, Commissioner's decision (June 4, 1975), aff'd, State Board (September 10, 1975). The Milltown argument was very similar to Absecon's: increasing numbers of its children were opting for private schooling and avoiding New Brunswick High School. (In a subsequent year, severance was granted, but only upon agreement of the receiving school district whose general population was predominantly white and for several reasons considered good and sufficient.) New Brunswick High had 61 percent non-white pupils (id. at 451). In Jenkins, et al. v Twp. of Morris School District and Bd. of Ed. of Morristown, 58 N.J. 483 (1971), our Supreme Court revisited the Commissioner's authority to avoid racial imbalance. Morristown's school population was 39 percent black and was expected to increase to 65 percent black by 1980. The township's school population was 5 percent black and that proportion was expected to decrease. Morristown High School was a receiving school for three white communities and thus was only 14 percent black, but was expected to reach a 56 percent proportion of black students by 1980 if the white sending dictricts were allowed to withdraw. The Jenkins court held that the Commissioner had power to prevent Morris Township from withdrawing from its relationship and that he had power to effectuate a merger at least where the districts were not multiple communities but a single one with no visible or factually significant internal boundary separations.

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In the course of reaching its conclusion, the Jenkins Court reviewed Booker, Brown, and subsequent cases such as Lee v. Nyquist, 318 F. Supp. 710 (W.D.N.Y. 1970), aff'd, 91 S. Ct. 1618 (May 4, 1971). The Jenkins court cited with approval, "it is by now well documented and widely recognized by educational authorities that the elimination of racial isolation in the schools promotes the attainment of equal educational opportunity and is beneficial to all students, both black and white." Id. at 498. The court reiterated Booker's teaching: "[L]eading educators . . . point to the disadvantages of homogeneous student populations, particularly when they are composed of a racial minority whose separation generates feelings of inferiority." Id. at 499.

After considering the precedents discussed above, I have no hesitation in CONCLUDING as a matter of law that when 93 percent or more of the students in a school are non-white, that school is overwhelmingly segregated, and removal of one-third to one-half of the remaining white students from the school would have a substantial negative effect on the receiving district. I CONCLUDE that Pleasantville has carried its burden of demonstrating that no matter how favorable all other factors to be considered might be to Absecon's cause of action, it cannot overcome the negative effect of rendering Pleasantville's High School students racially isolated. I CONCLUDE that, pursuant to N.J.S.A. 18A:38-13, a change of high school designation must be denied. It must also be denied on the basis that no other school district has agreed to accept Absecon's students so that it is not possible to apply the statutory standard to determine the effects of a change on the children in each concerned district.

My conclusions do not foreclose all Absecon's options, but relate only to the statutory standards and to these two parties. If some future legislation or State Board or appellate court holding addresses forced regionalization, and all appropriate districts are parties, some different remedy might be possible. Petitioner here cannot, however, pose a remedy of closing Pleasantville High School without including in the case all districts which would be required to receive Pleasantville students, if that school were closed. Absecon has declined to name either a voluntary new receiver or those districts which it claims should be regionalized or those which should be required to receive all the students now attending Pleasantville High. There are also less catastrophic options. Respondent is considering building a new high school and the parties have agreed to make a regionalization study. The parties could also confer to devise programs and policies more suited to Absecon's needs.

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Having noted early on that petitoner should have completed its feasibility study as required by the amended N.J.S.A. 18A:38-13, I include in this order assurance that in the event the Commissioner desires a fuller record, a feasibility study will be filed before any additional case related activity. Such a study must address not only these two districts, but that of any district which consents to be a receiver for Absecon high school students.

It is therefore **ORDERED** that the motion of the Board of Education of Pleasantville for summary decision dismissing the petition of the Absecon Board be granted based on the facts and conclusions above; and

that respondent is relieved from my orders granting discovery to Absecon, and further

ORDERED that in the event the Commissioner, State Board or courts direct a remand for plenary hearing, the petitioner shall file its feasibility study as a precondition to all further case related activity.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

April 6, 1988
DATE

Naomi Dower La Bastille
NAOMI DOWER-LA BASTILLE, ALJ

APR 07 1988
DATE

Receipt Acknowledged:
Seymour Weiss
DEPARTMENT OF EDUCATION

APR 8 1988
DATE

Mailed To Parties:
Ronald L. Taylor
OFFICE OF ADMINISTRATIVE LAW

ml/EE

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BOARD OF EDUCATION OF THE CITY OF ABSECON,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY,	:	
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner filed timely exceptions pursuant to N.J.A.C. 1:1-18.4. No reply exceptions were received.

Petitioner's voluminous exceptions are summarized in pertinent part below.

EXCEPTION 1

> THE ADMINISTRATIVE LAW JUDGE ERRED IN GRANTING SUMMARY DECISION UNDER N.J.A.C. 1:1-12.5 ON RACIAL IMPACT FACTORS. GENUINE FACTUAL DISPUTES ARE PRESENT, DEMONSTRATING LACK OF A SIGNIFICANT RACIAL IMPACT IF THE SENDING/RECEIVING RELATION BETWEEN ABSECON AND PLEASANTVILLE IS TERMINATED. THESE FACTUAL ISSUES APPROPRIATELY SHOULD BE RESOLVED IN AN EVIDENTIAL HEARING.

This exception is largely a reiteration of its argument posited at Point One of Petitioner's Brief and Affidavits In Opposition to the Motion for Summary Decision. Absecon relies on the affidavits of its two experts, Exhibits A and B, to demonstrate that termination of the sending-receiving relationship would not result in a substantial negative racial impact.

> ***To the contrary, although the ALJ found 1/3 to 1/2 of Pleasantville whites were from Absecon, the experts agreed that if all Absecon pupils left, racial and ethnic composition would only be affected insignificantly, by 3% and even less than that if a phased withdrawal occurred. Mr. Tannenbaum [one of petitioner's experts] demonstrated that future racial impact would also be negligible if any of these Absecon pupils were received by any other Atlantic County High Schools as potential receivers.*** (emphasis in text) (Exceptions, at p. 10)

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Petitioner argues that, contrary to the finding of the ALJ at page 8 of the initial decision that "any other receiving district in Atlantic County would become more segregated by receiving Absecon students since every other district is over 90 percent white, except Atlantic City***" (Exceptions, at p. 11 quoting Initial Decision, ante), "this data is unsupported in the record." (Exceptions, at p. 11) Petitioner contends that the statistics submitted by its expert, Mr. Tannenbaum, were largely unrefuted and demonstrated insignificant racial impact upon all potential Atlantic County receivers should they accept Absecon students. Thus, petitioner claims, there are material issues of fact precluding summary decision. Citing the decision on remand in In the Matter of the Application of the Board of Education of the Borough of South River for the Termination of the Sending-Receiving Relationship with the School District of Spotswood, 1970 S.L.D. 428, rem. State Board 1971 S.L.D. 659, decision on remand 1972 S.L.D. 286, petitioner contends the Commissioner has approved severance of a sending-receiving relationship where material alteration of existing racial balances in the districts (in the case of South River-Spotswood termination creating 3.3% racial ratio) does not result. Petitioner claims the ALJ in the instant matter erred in not projecting future impact as was done in the South River-Spotswood case.

Rearguing the case law it relied upon in its Brief in Opposition to the Motion for Summary Decision, Absecon summarizes its position in Exception 1 as follows:

> 1. [The ALJ] incorrectly used the expected decline in the percentage of white students attending Pleasantville High School as a result of termination of the sending-receiving relationship (between one-third and one-half) as the basis for her finding of substantial negative effect --- as noted above and consistently applied in the cases decided by the Commissioner and State Board (see, e.g., North Brunswick-New Brunswick and South River-Spotswood, supra) the correct standard is the impact on the entire student population (here 3 percent)[4] of a severance of the sending-receiving relationship;
>
> 2. If the ALJ had applied the correct standard, she would have been forced to find that the maximum impact, over the next five years, of the Absecon students' withdrawal from Pleasantville High School would be 3 percent --- but if an 8 percent increase in the percentage of non-white pupils resulting from withdrawal is not sufficient to defeat an application for

---

[4] Had the ALJ considered the effect of a phased withdrawal of Absecon students from Pleasantville High School, the percentage would have been even less.

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severance, how could the ALJ have determined as a matter of law[5] that a 3 percent increase constitutes a substantial negative racial effect? Clearly, her determination was erroneous.

3. She failed to consider any evidence as to the number of Pleasantville white high school age pupils who did not attend Pleasantville High School: if there are significant numbers of such pupils, it may well be asked why Absecon, which has a statutory right, if not an obligation, to determine where its school-age children should be sent to receive a thorough and efficient education, should be compelled to right a racial imbalance for which it is in no way responsible and to which Pleasantville has contributed by failing to attract its own high school age population to Pleasantville High School. (see New Brunswick-North Brunswick)

4. She refused to consider the affidavits of petitioner's expert witnesses on the issue of substantial negative racial effect, erroneously taking the position that they would in no way advance her understanding of the evidence or assist her in determining a fact in issue. In light of the observations contained in 1 and 2 above, it is respectfully submitted that the ALJ's failure to consider such evidence was error.

5. The ALJ refused to consider evidence indicating that in five years only ten Absecon white pupils would be attending Pleasantville High School. Thus, even if petitioner's severance application were denied, the number of Absecon whites attending Pleasantville High School would be more than halved (10/20-30) over the course of the next five years, resulting in a de facto termination of the sending-receiving relationship. In view of these figures, it is difficult to understand how the ALJ could have found a substantial negative racial effect as a matter of law.

---

[5] A finding "as a matter of law" presupposes the existence of some legal precedent for the finding, but the ALJ was unable to point to any statute, administrative regulation or decision supporting her view that 3 percent, as opposed, for example, to 5 percent, constituted a substantial negative racial effect.

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> The result of the ALJ's ruling will be to perpetuate the educationally bankrupt status quo to the detriment of both Absecon and Pleasantville students. Surely the law governing sending-receiving relationships was never intended to lead to such an outcome. The Commissioner and State Board recognized the same implications in the New Brunswick-North Brunswick case and granted North Brunswick's severance application. It is respectfully requested, therefore, that the ALJ's summary determination be overturned so that all the facts material to the petitioner's application may be introduced and fully and fairly considered***." (emphasis in text) (Exceptions, at pp. 23-25)

Moreover, in Exception 1 petitioner avers the question of whether to grant severance requires a balanced judgment. It cites In the Matter of the Application of the Board of Education of the Township of Liberty for the Termination of the Sending-Receiving Relationship with the Board of Education of Belvidere, 1975 S.L.D. 431, which, it states, still applies under the amended version of N.J.S.A. 18A:38-13:

> ***The principal question for determination herein is whether petitioner has advanced the required "good and sufficient reason" which should cause the Commissioner to make an equitable determination in its favor. If the answer to this question is an affirmative one and if it is determined that a severance of petitioner's relationship with respondent would be equitable, there is a subsidiary question concerned with the selection of an appropriate date for the severance to be effectuated. (at 436)

Relying on the above paragraph, petitioner claims that the issue of whether a new receiver must be established at the outset of litigation to sever is a subsidiary question, one of when severance is to take effect, which "can be decided at a later date after exploratory study on alternative options open to the sending districts' pupils." (Exceptions, at p. 26) Petitioner avers the ALJ erred in mandating a potential new receiver before the equitable determinations on severance are made.

Further, petitioner argues at page 27 that, contrary to the determination in the initial decision, "no one factor alone, such as race, is determinative of a matter of law." Citing In the Matter of the Application of the Board of Education of the Borough of Ogdensburg for the Termination of its Sending-Receiving Relationship with the Board of Education of the Borough of Franklin, 1977 S.L.D. 610 and In the Matter of the Application of the Board of Education of the Township of Liberty, supra, petitioner claims "[t]he balanced judgment measures the positive benefits accruing to the pupils in

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relation to the claims of the receiving district." (Exceptions, at p. 27)

Finally, in regard to Exception 1, petitioner states:

> [T]ermination of the sending-receiving relation has only been denied where substantial numbers of pupils were involved, creating a significant, adverse impact on racial composition, program curriculum, revenues, and faculty composition. Petitioner's experts assert that none of these adverse considerations would result in Absecon's withdrawal of its students from Pleasantville. (Exceptions, at p. 27)

EXCEPTION 2

THE ADMINISTRATIVE LAW JUDGE ERRED IN GRANTING SUMMARY DECISION UNDER N.J.A.C. 1:1-12.5 ON THE BASIS OF ABSECON LACKING A POTENTIAL RECEIVING DISTRICT. GENUINE FACTUAL DISPUTES EXIST ON THIS ISSUE, DEMONSTRATING THAT THERE ARE ACCEPTABLE ALTERNATIVES OPEN FOR ABSECON PUPILS SHOULD TERMINATION OF THE SENDING/RECEIVING RELATIONSHIP BE GRANTED.

Petitioner again claims that N.J.S.A. 18A:38-13 as amended does not provide for the requirement of an alternative district prior to the Commissioner's making equitable determinations "based upon consideration of all the circumstances,***." (N.J.S.A. 18A:38-13) The language of the statute, avows petitioner, "evinces legislative intent not to require same as a precondition to termination. Contrary to the statutory language, the ALJ reasoned that the lack of a resolution from a new receiver at this stage of the litigation foreclosed the making of any statutory considerations. (Initial Decision, p. 8, 9, 11)" (Exceptions, at pp. 28-29)

Petitioner claims the ALJ's decision in this regard "ignores a long and unbroken line of precedent and misconceives the import of N.J.S.A. 18A:38-13.1, which became effective on November 24, 1986 along with the amendments to N.J.S.A. 18A:38-11." (Exceptions, at p. 29) Relying on the 1970 decision in In the Matter of the Application of the Board of Education of the Borough of South River, supra, Absecon argues that the Commissioner ordered future termination of a sending-receiving relationship between South River and Spotswood due to overcrowding conditions, "even though there was no potential new receiver at that stage***." (emphasis in text) (Exceptions, at p. 30)

In South River-Spotswood, petitioner avows, the Commissioner ordered termination in 1974 and allowed the parties exploratory study time in order to either regionalize, find a new receiver or build a new high school. Petitioner argues:

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> Most significantly, this shows it is not necessary or legally required that the academic merits of alternate receiving districts, as compared with Pleasantville, be contrasted at this stage of the litigation as a precondition to termination of the present sending-receiving relation.*** (emphasis in text)
> (Exceptions, at p. 31)

Other cases have sanctioned phased withdrawals of the sending districts' students over a period of years in order to prepare regionalization studies and/or to evaluate the viability of new receiving districts, Absecon contends, citing In the Matter of the Application of the Board of Education of the Borough of Ogdensburg, supra, and In the Matter of the Application of the Board of Education of the City of Vineland for the Termination of the Sending-Receiving Relationship with the School Districts of Newfield, Pittsgrove, Weymouth and Buena Regional, 1971 S.L.D. 156, 171. Petitioner argues that whether the sending-receiving relationship is severed by the sending district or the receiving district, as was the case in South River-Spotswood and Vineland, "the sending district's students will be displaced and must be provided for. The essential point is that failure to have a new receiving district 'at the ready' is not, contrary to the ALJ's holding, fatal to a severance application." (Exceptions, at p. 33) Petitioner also cites Brielle Board of Education v. Manasquan Board of Education, decided by the Commissioner August 7, 1985 for the proposition that a comparison of aspects of the former and potential receiving districts was not required as an element of Brielle's burden of proof for termination.

Absecon argues that to accept the ALJ's argument on this point would

> necessarily put an end to any sending-receiving litigation even where regionalization, merger or pupil transfers are the appropriate solutions. Furthermore, the affidavit of Absecon's Superintendent underscores the fact that many potential, interested new receiving districts do not whole-heartedly evidence their interest as a new receiving district until the litigation ends (see Exhibit C). (Exceptions, at p. 34)

Petitioner finds further support for this proposition in the State Board decision in Board of Education of the Township of Cranbury v. Board of Education of the Township of Lawrence, decided by the Commissioner September 30, 1985, rev'd State Board April 1, 1987, appeal pending, in establishing that former and proposed receiving districts need not be contrasted as a criterion for termination. Rather, argues petitioner, Cranbury established only two criteria for withdrawal; that is, that the preference of a sending district to educate its pupils elsewhere will be honored a) if educationally based, and b) if it does not create unwarranted instability, with the burden then shifting to the receiver to show

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negative impact to defeat withdrawal. "A thorough analysis of the language in the Cranbury decision is examined in Exception #4 showing that the impact on the new receiver is not a prerequisite for termination, especially where other alternative options are present for the sending district's pupils." (emphasis in text) (Exceptions, at p. 35) Petitioner cites in its exceptions those alternatives for Absecon which it cited at page 21 of its Brief in Opposition to the Motion for Summary Decision:

> 1) Absecon initiating a potential new sending-receiving relationship with Hammonton, Mainland and/or Egg Harbor Regional, circumstances that are evidenced by the affidavits of Absecon Superintendent, Walter Krug (Exhibit C);
>
> 2) Closing the Pleasantville institution, as requested by Petitioner in the pleadings as alternative relief and dispersing its pupils. This was implemented in the Morean and Jamesburg decisions as an alternative option to end racial imbalance in a district.*** (Exceptions, at p. 36)

Absecon then sets forth its arguments in favor of the Commissioner's power to merge districts and to recommend and/or cross district lines to transfer pupils or regionalize school districts. Petitioner's recitation in exceptions is a nearly verbatim reiteration of those arguments presented on these options as set forth in its Brief in Opposition to the Motion for Summary Decision, at pp. 25-30. Said arguments are incorporated herein by reference. Petitioner's Exception 2 summarizes its position concerning alternatives available to Absecon and Pleasantville as follows:

> Petitioner's consultant's affidavits show that perpetuation of Pleasantville's sending-receiving relationship with Absecon will not correct racial imbalance. It will only possibly expose the Absecon pupils, as well as its own, to the negatives of an inferior education. The children are entitled to more, and, at the very least, an evidential fact-finding hearing at the OAL upon which to build an adequate record for alternative options embracing regionalization, pupil transfers, mergers, etc. These may be fashioned and/or recommended to correct deficiencies. This is not new. It was implemented in previously cited cases. The attached affidavit of Dr. Walter F. Krug indicates that the alternate regionalization for Absecon and Mainland is viable and that the other alternative districts of Egg Harbor, Hammonton and Mainland have not foreclosed Absecon from a future sending/receiving relationship.

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> Respondent advocates the perpetuation of segregation and an apparently deficient sending/ receiving relation because Absecon allegedly has no better option. This is not accurate. Projections show Absecon pupils will not increase to achieve racial balance even in a contemplated new facility built in Pleasantville. (emphasis in text) (Exceptions, at p. 44)

EXCEPTION 3

> THE ADMINISTRATIVE LAW JUDGE ERRED IN GRANTING SUMMARY DECISION UNDER N.J.A.C. 1:1-12.5 BEFORE DISCOVERY AND A FEASIBILITY STUDY COULD BE COMPLETED.

Petitioner again poses its argument raised at pages 31-32 of its Brief in Opposition to Summary Decision that discovery is incomplete in this matter. It cites Bilotti v. Accurate Forming Corp., 39 N.J. 184, 206 (1963) and Slohoda v. UPS et al., 193 N.J. Super. 586 (App. Div. 1984) for the proposition that summary decision should not be granted if answers to interrogatories, depositions and other discovery materials are outstanding.

Moreover, petitioner again incorporates its argument that respondent's future racial projections conflict with petitioner's consultants, averring the "[r]espondent's 317 Absecon pupils projected were not only unreasonable, but were unsupported by an affidavit from the individual that did these calculations." (Exceptions, at p. 46) Absecon further argues that the only evidence set forth by respondent were current enrollment statistics certified by Gustav Ruh, the County Superintendent. Petitioner argues that respondent's future projections are not legally sufficient for the motion. "These projections, intended to be relied on, not already appearing of record, are required under our rules to be submitted to the Court by way of affidavit or testimony. N.J.A.C. 1:1-12.4; R.1:6-6; R.4-46.2. The failure of Respondent to do so is fatal going to the heart of procedural due process." (Exceptions, at p. 47) For this reason and because the ALJ determined at page 9 of the initial decision that she needed no expert documentation to rule that withdrawal would occasion a significant racial impact as a matter of law, Absecon avers that "summary decision was inappropriate in the face of Petitioner's consultants' affidavits demonstrating the lack of significant racial impact if termination were granted. Celino v. General Accident Insurance, 211 N.J. Super 538 (A.D. 1986)." (Exceptions, at p. 47) Absecon claims all doubt should have been resolved against Pleasantville on the motion. It cites Nolan v. Otis Elevator, 197 N.J. Super. 468 (App. Div. 1984) for this proposition as well.

EXCEPTION 4

> THE INITIAL DECISION IS NOT IN CONFORMITY WITH LEGAL STANDARDS ENUNCIATED BY THE STATE BOARD IN BOARD OF EDUCATION OF CRANBURY VS. BOARD OF

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EDUCATION OF LAWRENCE AND OTHER CASES EXAMINING STUDENT ENTITLEMENTS IN RECEIVING A THOROUGH AND EFFICIENT EDUCATION.

Again referring to the State Board decision in Cranbury, supra, petitioner elaborates on its argument that there is little support for the ALJ's conclusion that petitioner could not show application of the statutory criteria set forth at N.J.S.A. 18A:38-13 as amended because Absecon had no resolution from a new receiving district. Absecon contends that Cranbury emphasized that "the sending/receiving relation is intended to benefit pupils in sending districts. It established that the merits of former and proposed receiving districts need not be contrasted as a criteria for termination." (emphasis in text) (Exceptions, at p. 49) It again claims that it is no longer incumbent on Absecon to prove negative impact and that, contrary to the ALJ's determination, an alternative district is not an absolute prerequisite to litigation continuing at this mid-discovery stage of the proceedings.

Absecon argues Cranbury "only addressed the negative impact factor *** as a statutory consideration relative to the former receiving district, not the potential receiver." (emphasis in text) (Exceptions, at p. 50) Moreover, in exception to the ALJ's conclusion that Absecon cannot make the required showing of "unwarranted instability" under the Cranbury decision because it lacks a potential receiver (Initial Decision, at p. 8), petitioner claims that "nowhere in the Cranbury decision does the State Board require that this criteria must be demonstrated vis-a-ve (sic) effect on the potential receiver. To the contrary, in dealing with the concept of 'unwarranted instability' relative to Petitioner's burden of proof, the State Board described it in terms of whether or not the old receiving district would suffer instability or negative impact from the severance, citing Washington Township***." (emphasis in text) (Exceptions, at p. 51)

Absecon finds it ironic that the ALJ chose to rely on Cranbury for the proposition that a relation with a new receiver is a legal requirement.

> [N]owhere in its discussion of such factors does the State Board in Cranbury-Lawrence mention the existence of a new relationship with a new district as a condition precedent to termination of an existing sending-receiving relation. In fact, extensive research has not revealed any case which makes this an element of a cause of action under the statute, as originally drawn or as amended. (emphasis in text)
>
> (Exceptions, at p. 53)

As to the ALJ's citing N.J.S.A. 18A:38-13.1 in support of her holding, petitioner contends this section

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> as a means of lending some stability to sending-receiving relationships, does no more than to require that any new sending-receiving relationship entered into after termination of an existing one, remain in place for at least five years. It does not, however, by its language or logic, impose on a petitioner in a sending-receiving case under N.J.S.A. 18A:38-13, the unprecedented obligation to prove it has entered a new five-year relationship***. (emphasis in text) (Exceptions, at p. 54)

Absecon then avers under Exception 4 that it is not precluded on the basis of the motion before the court to bring to the record its proofs on the issue of the educational impact of withdrawal under the Cranbury or Washington Township standards. Absecon contends the ALJ erred in concluding that these proof were "surplusage." (Exceptions, at p. 55 quoting the Initial Decision, ante)

In this regard petitioner updates its analysis of the Level III monitoring being conducted in Pleasantville, then reiterates its legal arguments raised in its Brief in Opposition to the Motion for Summary Decision at pages 13-14. Said arguments on the issue of program quality are incorporated herein by reference, including the updated analysis of the Level III monitoring as found at pages 60-61 of petitioner's exceptions.

EXCEPTION 5

> THE ADMINISTRATIVE LAW JUDGE COMMITTED ERROR IN GRANTING SUMMARY DECISION AS TO THE THIRD COUNT OF THE PETITION.

Petitioner claims the ALJ dismissed Count Three of the Petition of Appeal which averred in pertinent part that "as a result of the foregoing deficiencies, the efforts of the Pleasantville Board of Education and its administrative and instructional staffs to offer an appropriate and satisfactory program of education to the pupils attending Pleasantville High School have been seriously impaired and curtailed. (Petition of Appeal, at p. 7) Absecon suggests the ALJ did so relying upon the State Board Remand of December 7, 1983 in Washington Township Board of Education v. Upper Freehold Regional Board of Education et al., 1982 S.L.D. 928, Decision on Remand November 21, 1984, aff'd State Board June 6, 1985, aff'd N.J. Superior Court, Appellate Division, September 17, 1986, stating that "proof of failure to provide a Thorough and Efficient education is 'irrelevant' (Initial Decision, at pp. 5 & 8) and because Petitioner failed to name in its petition as respondents 'all districts which would be required to receive Pleasantville students, if that school were closed.' (Initial Decision, at p. 11)" (Exceptions, at p. 62)

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Petitioner's position in this regard follows:

> While it is accurate to say that the Washington Township case cited by the ALJ relieved petitioners in sending-receiving cases of the responsibility of proving that the receiving district was not providing a thorough and efficient education, it does not follow that a petitioner seeking to close a school should be prohibited from introducing evidence on the T&E issue. Indeed, the very essence of a closure case is the respondent district's failure to provide a T&E education to students attending school in that district (NJSA 18A:7A-2, 15; NJSA 18A:33-1; see In the Matter of the Closing of the Jamesburg High School, supra). It is mistefying (sic), therefore, why the ALJ felt compelled to dismiss Count Three of the Petition.
>
> Furthermore, in the Jamesburg case cited above, the Commissioner ordered the closing of Jamesburg High School despite the absence of a school to which the displaced Jamesburg students could be sent; the selection of receiving district for these students was simply deferred to a later time. The ALJ's determination that the third count of the Petition was deficient for failure to name potential receiving districts was clearly unwarranted, then, in light of Jamesburg, supra.
>
> Finally, the ALJ stated at oral argument of the Respondent's Motion for Summary Decision, "Nor do I have anything to do with closing that high school." (Transcript of oral argument on March 14, 1988, at p. 7) This is plainly wrong. (Jamesburg, supra). (Exceptions, at pp. 62-63)
>
> EXCEPTION 6
>
> THE ALJ FAILED TO DECIDE THE MOTION FOR SUMMARY DECISION WITHIN THE TIME PRESCRIBED UNDER N.J.A.C. 1:1-12.5.

Averring that the regulation in question states that motions for summary decision shall be decided within 45 days of the date of submission, Absecon avers the decision was rendered outside of the 45-day period. It claims the final reply from petitioner was submitted on or about January 14, 1988 and, contrary to the initial deicsion, the record closed on the day of the last submission, January 14, 1988. Petitioner avers the decision should have been rendered by February 28, 1988. In fact, it was rendered on April 6, 1988. The initial decision indicates the record closed on March 14, 1988. Counsel for petitioner indicates that she contacted the ALJ in February to see if oral argument would be entertained in response

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to her request that there be oral argument, at which time the ALJ advised there would not. Thereafter, counsel for Absecon avers:

> Counsel received no indication from the ALJ until March 9, 1988, at which time the ALJ scheduled oral argument on March 14, 1988. (See Transcript, Exhibit F) Accordingly, the April 8, 1988 decision was well outside 45 days after the record closed on January 14, 1988. The decision in this case contravened the 45-day limitation mandatorily imposed under N.J.A.C. 1:1-12.5(c). oral argument was directed well after the 45-day limitation had expired under the rules.
>
> The tape of oral argument, furthermore, did not enunciate the arguments of counsel and therefore, could not have been considered via a decision in this case. Thus, there could have been no reason to attempt extension of any decisional time limits on the basis of the need for same. (See Exhibit F) (Exceptions, at p. 65)

EXCEPTION 7

THE INITIAL DECISION SERVES TO FOSTER SEGREGATION RATHER THAN INTEGRATION FOR PLEASANTVILLE HIGH SCHOOL IN THE FUTURE.

Absecon avers that, in the initial decision, summary decision was based on the premise that Absecon's withdrawal would leave Pleasantville racially isolated, fostering segregation in violation of accepted state policies encouraging integration. It cites the initial decision at page 11 in this regard. Petitioner claims its statistics demonstrated that, by 1992, 10 out of 18 Absecon pupils attending Pleasantville will be white in a pupil population that would include 53-59 Pleasantville whites. Absecon cites the following chart of figures:

Year	Absecon Pupils	Absecon Whites	
1988-89	20	15	Pleasantville
1989-90	20	16	whites 1988-93
1990-91	18	15	will compose
1991-92	17	11	53-59 in addition
1992-93	18	10	to white Absecon pupils.

In summary of its position, Absecon encapsulates its position as follows, relying on the above chart:

> It is clear that Pleasantville is suffering from a "defacto" termination relative to white Absecon pupils. Perpetuation of the sending-receiving relationship will do little if nothing to alleviate the racial imbalance and foster

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integration. Withdrawing the Absecon pupils certainly will not leave Pleasantville "racially isolated" as the Initial Decision states on p. 11. This claim ignores the statistics and the white Pleasantville population. The White Absecon pupils in 1992 are not going to achieve integration in the Pleasantville system. The solution is not to keep Absecon in an unproductive sending-receiving relationship but to build a record in an evidential hearing so that an appropriate remedy may be fashioned. This is as opposed to foreclosing any solution for these children by the granting of summary decision. The statistics of a defacto termination which has been occurring in any case since 1980 cannot be ignored.

The statistics demonstrate that summary decision was inappropriate at this juncture. An appropriate record for the Commissioner should have been generated. Contrary to the Initial Decision, alternative remedies for Absecon, by the regionalization of Absecon with other districts such as Mainland or the use of pupil transfer programs, mergers, etc., could and should be fashioned during or after the hearing on the factual disputes in this litigation.

The OAL and Commissioner have broad statutory powers to recommend and/or cross district lines. The Commissioner has the power to order compulsory mergers and/or pupil transfers to end racial imbalance. This is not a new concept. Township Committee of Morris v. B.O.E. of Morris Township, 60 NJ 186, 287 A.2d 449 at 452 (1972). N.J.S.A. 18A:38-8 et. seq., N.J.S.A. 18A:6-9. In Ogdensburg B.O.E. v. Franklin B.O.E. 1977 S.L.D. 610. aff'd St. Bd. 77:618, the Commissioner after hearing at the OAL terminating a sending/receiving relation, endorsed this as an acceptable alternative:

> The Commissioner is convinced that the educational needs of the area will most appropriately be met by the establishment of a *** Regional High School***.
>
> The financial inequities which the Franklin Board alleges would exist if Ogdensburg pupils were allowed to leave Franklin would most equitably be alleviated by the establishment of that proposed regional high school. Toward

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> this end the Commissioner will, upon request, provide *** such technical assistance as the Department of Education is able to provide. 1977 S.L.D. 610 at 616.
>
> The OAL and/or the Commissioner may fashion mergers or transfer plans as just one alternative solution to Absecon's problem. To ignore the program and allow continuation of the sending/receiving relation amounts to state action in furtherance of segregation.
>
> (Exceptions, at pp. 66-68)

EXCEPTION 8

THE ADMINISTRATIVE LAW JUDGE'S ULTIMATE FACT FINDINGS WERE IMPROPERLY SUPPORTED ONLY BY HEARSAY EVIDENCE.

Petitioner avers the ALJ improperly rested all of her Findings of Fact upon hearsay evidence. It contends that all the evidence relied upon by the ALJ was in the form of letters, statistical compilations and affidavits. This, it claims, was in violation of N.J.A.C. 1:1-15.5(b).

Based upon the foregoing, petitioner urges the Commissioner to reverse the initial decision and remand this matter to the Office of Administrative Law for an evidential hearing upon the merits.

Having carefully conducted an independent review of the instant matter, the Commissioner affirms the conclusions and determinations of the Office of Administrative Law for the reasons expressed therein as amplified below. Before reaching a discussion of the merits of the Motion for Summary Decision, however, the Commissioner will first dispose of petitioner's procedural exception wherein it is averred that the ALJ failed to decide the Motion for Summary Decision within the time prescribed under N.J.A.C. 1:1-12.5.

Counsel for Absecon claims that she called the ALJ in February to ask if there would be oral argument, as requested by Absecon, following submission of the last written reply brief on January 14, 1988. There is no evidence provided the Commissioner in support of this assertion by counsel. However, a transcript of the oral argument which took place by telephone on March 14, 1988 has been provided the Commissioner. Therein at page 21 the ALJ states:

> THE COURT: All right. I don't need anything more. I will try to do this as quickly as possible. I would have had it done had it not been for the vacation. I couldn't get to ask you these last few questions that came up. But it will be out now within, within 45 days or probably much sooner.

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N.J.A.C. 1:1-2.1, the definitional section of the OAL rules states: "'Conclusion of hearing' means that time when the record for a case closes and after which no subsequently submitted information may be considered by the judge." Thus, it would appear from the record that the ALJ closed the record on March 14, 1988. The initial decision was rendered on April 6, 1988, well within the 45-day limit.

Had petitioner deemed the oral argument of March 14, 1988 inappropriate, because counsel believed the record closed in January, the matter should have been raised at the time of oral argument. There is no indication in the transcript of petitioner's resistance to oral argument. Neither did Absecon's counsel bring the matter to the Commissioner's attention by way of interlocutory appeal. Moreover, the law provides no penalty for rectifying an alleged breach of OAL's procedural rules. Accordingly, Exception 6 is dismissed as being without merit.

The Commissioner begins his review of this matter by noting that the ALJ framed her conclusions of law in deciding the instant Motion for Summary Decision upon what is stated as "Undisputed Material Operative Facts." (See Initial Decision, ante) The transcript of the oral argument conducted on March 14, 1988 supports the ALJ wherein she states on page 6 of the initial decision:

> At oral argument, I also asked the parties whether they could fairly find any dispute of fact as to what I considered the operative facts on their motion. I discussed the undisputed facts I intended to find to give the parties an opportunity to refute them by adverting to facts in the filed papers. While there were minor discrepancies in numbers and percentages, Pleasantville's agreement to accept the figures on racial composition offered by Absecon permits me to make these findings:
>
> UNDISPUTED MATERIAL OPERATIVE FACTS
>
> 1. In the 1986/87 school year, 93 percent of Absecon's eighth graders but only about 11 percent of Pleasantville's [584] high school students were of the white race.
>
> 2. Racial ratios in these schools have been relatively consistent in recent years and no substantial changes are projected for the next five years.
>
> 3. Withdrawal of Absecon's students from Pleasantville High would only have about a 3 percent effect on the racial composition of the school.

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4. Withdrawing Absecon students would, however, result in reducing the white student population at Pleasantville High by between one-third and one-half. (The difference arises from the fact that the number of white Pleasantville resident students has declined in the most recent year.)

5. Currently, between 20 and 30 Absecon students attend Pleasantville High School and 350 attend Holy Spirit High School.

6. Absecon has no commitment by the Board from any other district to accept its high school students.

7. Pleasantville High School is currently undergoing a Level III review; all indicators except five were rated as acceptable on September 15, 1987, and on-site preliminary compliance review and program deficiencies review activities began on January 11, 1988. The five indicators were in the elements of attendance and basic skills achievement.

8. If all Absecon students were withdrawn in 1988, Pleasantville would lose about $110,000 in tuition which would be less than 1 percent of its budget.

It is noted that neither of Absecon's written summations on the Motion, dated December 8, 1987 and January 7, 1988, argues that any of the information before the ALJ was hearsay. Neither do the exceptions refer to specific figures, documents, affidavits or submissions which it believes must be excluded because of hearsay. On the contrary, the transcript suggests accord among the ALJ and counsel concerning the facts that were eventually incorporated into the initial decision as undisputed operative facts. See Transcript, March 14, 1988 at pp. 11-16. The Appellate Division has spoken on the specificity required concerning exceptions in In the Matter of Morrison, 216 N.J. Super. 145, 157-158 (meaningful agency review of findings of administrative law judge necessitates that agency be supplied timely with parts of transcript relating to exceptions to those findings, and that the agency then review those portions which relate to material issues raised by contestant's exceptions, N.J.S.A. 52:14B-1 et seq., 52:14B-10 (c) and (d). Petitioner's exception concerning hearsay was not detailed, nor did the

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transcript provide support for its position. Accordingly, the Commissioner rejects exception 8 as being without merit. Moreover, he likewise rejects that part of Exception 1 suggesting that respondent's evidence was "inaccurate and unsupported by affidavit as required under NJAC 1:1-12.4 and R.1:6-6, R.4:46-2" (emphasis in text) (Exceptions, at p. 8), since Absecon at oral argument concurred in establishing the uncontested operative facts.

Moreover, based on those undisputed material operative facts, the Commissioner is in accord with the ALJ's conclusion that Pleasantville, as the party bringing the motion, has borne its burden of proving significant negative impact so substantial as to prevent Absecon from withdrawal from the sending-receiving relationship it shares with Pleasantville.

It is noted at the outset of this discussion of the merits of the Motion for Summary Judgment that the parties stipulated that they would be bound by N.J.S.A. 18A:38-13, as amended, notwithstanding the fact that the petition was filed in advance of the effective date of said amendments. These amendments eliminated the "good and sufficient reason" standard articulated as the standard of review in applying to the Commissioner for approval to terminate a sending-receiving relationship between or among school districts. The amendments replaced this standard with a provision that the Commissioner "shall grant the requested change*** if no substantial negative impact will result therefrom." N.J.S.A. 18A:38-13, as amended, effective November 24, 1986 The criteria the Commissioner shall consider include but are not limited to "the educational and financial implications for the affected districts, the impact on the quality of education received by pupils and the effect on the racial composition of the pupil population of the districts." (Id.) In so considering these factors, the legislation states, "The commissioner shall make equitable determinations based upon consideration of all the circumstances***." (Id.) The Legislature also added a requirement providing that a district seeking to sever a sending-receiving relationship must conduct and submit a feasibility study before it makes application to the Commissioner.

Thus, relying on all the data gathered in the feasibility study, plus that gathered at hearing, the Commissioner is charged with reviewing the matter broadly, and not merely limited to the three negative impacts enumerated in the statute. Consequently, as noted by the ALJ, "Even if all these [three] considerations are favorable to the petitioner, if the respondent shows that the change will have a substantial negative impact, the request shall not be granted." (Initial Decision, ante) The State Board's interpretation of N.J.S.A. 18A:38-13, before amendment and after, suggests further that the amendment to the law "does not represent a departure from the legislative policies embodied in the statutory scheme applicable to sending-receiving relationships prior to amendment of N.J.S.A. 18A:38-13, but rather gives further definition to the balance between those policies." Cranbury, supra. As stated by the ALJ in the initial decision, after the sending district presents an educationally based reason for withdrawal supported by a

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presentation of facts and some support for a claim of no significant impact on the receiving district, the burden then shifts to the receiver to demonstrate it will suffer "significant negative impact."

The Commissioner's review of the competing policy considerations, such as stability in sending-receiving relations and also local participation in educational matters pursuant to N.J.S.A. 18A:7A-2, coupled with his consideration of all the equitable circumstances, must be focused against the long-standing policy in this state against racial discrimination and segregation in our public schools. See N.J. Constitution (1947), Art. 1, para. 5. See also N.J.S.A. 18A:38-5.1; Jenkins v. Morris Twp. School District, 58 N.J. 483 (1971); Booker v. Plainfield, supra; Branchburg Twp. Bd. of Educ. v. Somerville Bd. of Educ., 173 N.J. Super. 268 (App. Div. 1980). See also Initial Decision, ante. Having carefully considered the precedents of law, these competing policies and the undisputed operative facts, he concurs with the ALJ that permitting the withdrawal of Absecon from its sending-receiving relationship with Pleasantville would virtually isolate Pleasantville as a segregated school district.

It is Absecon's position that the withdrawal of Absecon students would not have a significant effect upon the racial balance at Pleasantville High School. Its exceptions aver, moreover, that the ALJ incorrectly relied on the expected decline in the percentage of white students attending Pleasantville as a consequence of the termination of the sending-receiving relationship, (between 1/3 and 1/2) as the basis for her finding of substantial negative impact. Instead Absecon suggests that even if all white Absecon students were withdrawn, that 3% population would have insignificant effect on the ethnic student population at Pleasantville High School.

In this regard, the Commissioner agrees with the point made in Pleasantville's Brief in Support of the Motion for Summary Decision that Petitioner's position appears to be predicated upon the idea that the number or percentage of Absecon students now attending Pleasantville High School is small.

> ***Respondent, by contrast, take the view that the loss of the Absecon students means the loss of 1/3 to 1/2 of the white population of a school which now has an overwhelming black to white student population ratio. When taken in that context the removal of half of the present white student population does have a significant effect upon the racial composition of Respondent's high school. The difference between the position of Petitioner and Respondent is in the way the figures and percentages are viewed. Such a difference does not arise to a genuine issue as to material fact but merely a difference in interpretation, which in any event, the resolution of which is in the province of the trier of fact and law." (Respondent's Brief in Support of the Motion for Summary Decision, at pp. 9-10)

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The Commissioner adopts respondent's position in this regard as his own.

Moreover, the Commissioner finds the true issue in this matter is not what number of whites actually attend the public high school, but rather is what number are eligible to attend. The undisputed operative facts reveal that there are some 350 other Absecon students attending a parochial school in the area. Thus, if white residents of Absecon choose to send their children to private schools rather than to the school which is legally designated as the receiving district, their choice of non-attendance should not be expected to result in a state-endorsed policy which would result in total or almost total racial isolation of the school officially designated as the receiving district. Permission to terminate the sending-receiving relationship between these two communities, then, would be tantamount to state action in furtherance of racial segregation, which is prohibited by the Fourteenth Amendment of the Federal Constitution, the New Jersey Constitution, the cases cited herein, as well as those mentioned in the initial decision, ante.

Thus, the Commissioner dismisses as being without merit petitioner's reliance upon Ogdensburg, supra, and Liberty, supra, for the proposition that one factor alone, such as race, is not determinative as a matter of law in terminating a sending-receiving relationship. The primary consideration in this matter is racial imbalance. Overcrowding was primarily at issue in Ogdensburg-Franklin. Liberty-Belvidere focused on the desire on the part of Liberty Township to consolidate all of its high school students into a single high school. In neither case was racial impact a factor at all in the Commissioner's considerations whether to terminate, as it is in the instant matter. While it is true that the Commissioner weighs all competing policy issues in reviewing an application for terminating a sending-receiving relationship, the fact that neither Ogdensburg nor Liberty involved racial imbalance distinguishes those cases from the instant one.

Further, petitioner's reliance on South River-Spotswood, supra, for the proposition that the Commissioner has approved severance of a sending-receiving relationship where material alteration of the existing racial balance in the district does not occur is inapposite. That matter came before the Commissioner primarily on the issue of overcrowding, not racial imbalance. Racial balance was not even mentioned in the Commissioner's decision in South River-Spotswood dated December 14, 1970. In remanding the decision to the Commissioner on September 8, 1971, the State Board reasoned that the Commissioner might reconsider his decision in light of an intervening decision rendered by the Court in Jenkins et al. v. Township of Morris School District et al., 58 N.J. 483 (1971) suggesting that "'***The Commissioner's determination (in the instant matter) might well have been otherwise had Jenkins predated his opinion.'" South River-Spotswood, supra, (1972 S.L.D. at 286) quoting Jenkins, supra. The Commissioner reaffirmed his earlier decision in South River-Spotswood on the basis that neither district's minority population was of such a percentage as to affect

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the balance of either district were a severance ordered. In those two communities, the total minority populations were in South River Borough 3.3% and in Spotswood Borough .004%. This case is readily distinguishable from the instant matter where the minority population in Pleasantville is dramatically higher than that of Absecon, and where Absecon contributes 1/3 to 1/2 of the white population to the high school at Pleasantville. Thus, the Absecon white population is very definitely a significant one at Pleasantville. Since South River's total black population was 3.3%, the withdrawal of Spotswood's virtually all non-minority population had no adverse effect upon the total racial balance in South River.

Further, the Commissioner finds Absecon's reliance on Morris School District v. Board of Education of the Township of Harding et al., 1974 S.L.D. 457, aff'd State Board 487, aff'd N.J. Superior Court, Appellate Division, 1975 S.L.D. 1109 inapposite for the proposition that the Commissioner permitted severance of that sending-receiving relationship even though the receiving district alleged a racial imbalance would result if severance were permitted. First, as in South River-Spotswood the primary issue in Morris was overcrowding. Moreover, the Commissioner notes that Petitioner's reliance on Morris is based on the following premise:

> To keep the small number of Absecon students in Pleasantville amounts to advancing segregation. Their attendance there will never do anything to achieve racial balance in the school. Petitioner's consultants agree that the racial balance in the Pleasantville system is not affected by the Absecon students to any great degree. Continuation of the sending-receiving relation with Absecon will do nothing at all to achieve racial balance." (Exceptions, at p. 15)

The Commissioner points out that petitioner's premise is based on actual white student enrollment at Pleasantville High School. Were the 350 students now attending the parochial school in the area who are from Absecon added to the current number of white students from Absecon attending Pleasantville, presuming said private school students were white, the balance at Pleasantville High School would be far nearly a 50%-50% split. Moreover, in Morris, the conclusion of the Commissioner took into account the one percent change in the racial population in his conclusion to sever as follows:

> The total withdrawal of Harding Township pupils from Morristown High School would increase the proportion of black pupils enrolled in Morristown High School by less than one percent. While in no way disregarding the psychological importance of such an increase, the Commissioner concludes that such an increase is not sufficient to cause a disproportionate change in the racial composition of Morristown High School. This is particularly so in view of the anticipated

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population growth in predominately white Morris Township with its far greater geographic area available for further development. This growth may be reasonably expected to decrease the percentage of black pupils enrolled in Morristown High School in future years, regardless of the decision herein.

Conversely, it is shown that the assignment of all Harding Township pupils to Madison High School would decrease its proportion of black pupils (presently six percent) by only three-tenths of one percent. The Commissioner finds this an insignificant factor that would in no substantial way affect the opportunities available to Madison pupils to be educated in a racially integrated school atmosphere.

Counsel for the Morris Regional Board states in his Exceptions and Objections to Hearing Examiner's Report that:

> "***The net effect of the transfer of Harding's white students from Morristown High School to Madison will be to increase the black enrollment percentage at Morristown High School by about 9% while serving to reduce the same at Madison by more than 13%.***"
> (at p. 10)

The Commissioner finds this expression of projected percentage changes of existing percentages of racial composition to be both misleading, subject to misinterpretation by the general public, and fraught with ambiguity.

The Commissioner concludes that the actual projected percentage changes of racial composition in either school which would result from a total withdrawal of Harding Township pupils from Morristown High School, would be less than one percent. In this instance, the Commissioner concludes that such a change in racial composition would not adversely affect either the Morristown High School or Madison High School.

(1974 S.L.D. at 485)

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As noted in Pleasantville's brief at page 10, petitioner's position regarding the Pleasantville community population as a whole suggests that Pleasantville's general population is largely black and not likely to change. If true, Absecon's position is contrary to the holding above in Morris which concluded that the population of predominately white Morris Township, which sent students to Morristown High School, would be growing and would be "expected to decrease the percentage of black pupils enrolled in Morristown High School in future years, regardless of the decision herein." (Morris, at p. 485) The Commissioner dismisses petitioner's argument relating to Morris, therefore, as being without merit.

Similarly, the Commissioner finds Absecon's reliance on Bd. of Ed. of the City of New Brunswick v. Bd. of Ed. of the Township of North Brunswick and Bd. of Ed. of the Borough of Milltown, 1974 S.L.D. 962 distinguishable from this matter. In that instance, severance was permitted despite what may have been an increase in the percentage of the black population at New Brunswick High School for two reasons: 1) the primary concern of overcrowding at New Brunswick High School would be eliminated by severing out the North Brunswick students to attend the new North Brunswick High School and 2) made a condition of such severance was the Commissioner's directive:

***

> 3. That the North Brunswick Board of Education provide space at the North Brunswick High School to accommodate up to 200 volunteering pupils from New Brunswick yearly, for a ten-year period. The New Brunswick Board of Education may select, from those volunteering, pupils whose educational interests, in its judgment, would be best served by attendance at North Brunswick. New Brunswick and North Brunswick Boards are urged to use this pupil assignment to build linkages between the two school communities in order to ameliorate the negative effects of racial segregation. Both New Brunswick and North Brunswick are specifically charged with the educational responsibility of working to make a reality of their mutually espoused concern for racial harmony. (at 998)

Petitioner has come forth with no such concrete recommendations for lessening the possibility of increasing racial isolation in the instant matter. The State Board affirmed this decision summarily. New Brunswick, supra, 1975 S.L.D. 1109 For the record, Milltown, another sending district in the North Brunswick case, was held in the sending-receiving relationship with New Brunswick as another means of maintaining racial balance until June 30, 1977. See In the Matter of the Board of Education of the Borough of Milltown to Terminate its Sending-Receiving Relationship with the Board of Education of the City of New Brunswick, 1976

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S.L.D. 854, State Bd. aff'd 863, appeal dismissed, N.J. Superior Court, December 6, 1976.

It is clearly established in law that whether to grant severance of a sending-receiving relationship requires a balanced review of all the circumstances in determining if substantial negative impact will result. Having reviewed the precedents of law as set forth by the ALJ and including those discussed above, the Commissioner agrees with the ALJ's conclusion in the initial decision, ante, where she states:

> ***I have no hesitation in CONCLUDING as a matter of law that when [90] percent or more of the students in a school are non-white, that school is overwhelmingly segregated, and removal of one-third to one-half of the remaining white students from the school would have a substantial negative effect on the receiving district. I CONCLUDE that Pleasantville has carried its burden of demonstrating that no matter how favorable all other factors to be considered might be to Absecon's cause of action, it cannot overcome the negative effect of rendering Pleasantville's High School students racially isolated. (emphasis in text)

Moreover, the Commissioner finds reinforcement for this position in Absecon's failure to provide at the time this action was brought an alternative receiving district prior to the Commissioner's considering all the circumstances as set forth at N.J.S.A. 18A:38-13. Absecon's reliance on what it terms "a long and unbroken line of precedent" where no alternative receiver was known at the time of litigation to sever (Exceptions, at p. 29) is misplaced.

In suggesting that there need be no new receiver established before petitioning the Commissioner for severance, petitioner relies primarily on South River-Spotswood, supra. While it is true that the Commissioner in that case did order severance of the parties' sending-receiving relationship before a new receiver was established, the issue in that matter was one of pressing future overcrowding. Racial imbalance was not seriously at issue. Moreover, the receiving district, South River, sought severance not the sending district, Spotswood. In so granting the relief requested by South River, the decision permitting the severance of Spotswood was forestalled four years, with the following directives and contingencies:

> The Commissioner finds and determines that the high school facilities presently available to petitioner are inadequate to provide a suitable program for its own students and those from the Spotswood district in future years, that the proper "ground" required by the statute quoted, ante, exists for a severance of the relationship.

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> Therefore, in order to grant both parties a reasonable period of time to plan in accordance with this decision, he directs that the sending-receiving relationship between the South River and Spotswood school districts be terminated in whole or in part as of September 1, 1974. He remands to the parties the matter of deciding on the details of separation applicable in that year, and, specifically, the decision as to whether the separation shall be complete or in phased stages. He further directs the Board of Eduation of Spotswood Borough to consult with the Middlesex County Superintendent of Schools and members of the staff of the State Department of Education for the purpose of providing an eduational program for its high school students beginning in September 1974. (1970 S.L.D. at 432)

In accordance with N.J.S.A. 18A:38-13 as amended, the Commissioner now deems information as to a proposed new high school relationship an integral part of the feasibility plan required by law to be submitted prior to his equitable determination whether to sever on the basis of all of the circumstances.

Contrary to petitioner's assertion, proposed alternatives did exist in In the Matter of the Application of the Bd. of Ed. of the City of Vineland for termination of the Sending-Receiving Relationship with the School Districts of Newfield, et al., 1971 S.L.D. 156. In Vineland, the four sending districts in question were urged by the County Superintendent as early as 1968 to develop alternatives to continuing the sending-receiving relationship with Vineland. In all districts except Pittsgrove Township viable alternatives were developed before the Commissioner's decision was rendered. In the instance of Pittsgrove Township, the Commissioner retained jurisdiction of the matter until Pittsgrove provided a viable alternative as earlier directed. The facts in that case, as recited above, negate petitioner's suggestion that the Commissioner ordered severance in that matter without establishing new receivers.

Petitioner's reliance on In re Jamesburg is inapposite for two reasons. First, the Jamesburg matter was a school closing issue, not a sending-receiving case. Declining enrollments and economy of resources were at issue there, primarily. Further, the county superintendent had been directed to develop viable alternatives for the Jamesburg/Helmetta students, which was done at the time of hearing. (See Jamesburg, at pp. 38, 54-57.) Ultimately, the county superintendent's recommended new receiver, Monroe, was chosen by the Commissioner as the appropriate one for Jamesburg students, and Spotswood for Helmetta pupils, as had been posited by the county superintendent at the outset. The ongoing consideration and separate litigation to finally settle on which districts should receive the Jamesburg and Helmetta pupils belie petitioner's contention that "the Commissioner of Education ordered the closing of Jamesburg High School despite the absence of a school district to which the displaced Jamesburg High School students could be sent***." (Exceptions, at p. 34)

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Further, the Commissioner finds petitioner's reliance on Brielle Board of Education v. Manasquan Board of Education, decided by the Commissioner January 19, 1985, State Bd. rev'd August 7, 1985 simply erroneous in suggesting that "a comparison of aspects of the former and potential receiving districts was not required as an element of Petitioner's burden of proof for termination.***" (emphasis in text) (Id.) Functional capacity at Pt. Pleasant was an integral part of that prospective new receiver's argument before the Commissioner. (See Commissioner's Decision, Slip Opinion at pp. 8, 17-20) The State Board in its first review of the matter as decided on August 7, 1985, which is the case petitioner cites, states at pp. 13-14:

> Finally, although Washington Township requires that we assess the impact on "all the districts involved," we do not read this requirement to necessitate balancing the relative academic merits of a proposed receiving district against those of the current receiving district where, as here, both have been found to provide quality education programs. *** However, we find that it is necessary that the existence of an acceptable alternative, one that meets constitutional standards, be established in order that we may fulfill our responsibility to insure the provision of a thorough and efficient eduation to the students of this state. We conclude that the existence of such alternative has been demonstrated in this case since it has been established that Point Pleasant Beach meets all such standards and is willing to establish a sending-receiving relationship with Brielle. (emphasis supplied)

While the State Board reconsidered the decision in this matter and reversed itself on other grounds (St. Bd. March 5, 1986), the Commissioner believes this language stands for the proposition that the district seeking to withdraw must present at the outset a feasibility plan inclusive of facts demonstrating an alternative receiver, "one that meets constitutional standards ***in order that we may fulfill our responsibility to insure the provision of a thorough and efficient education to the students of this state." (ante) Thus, the Commissioner finds erroneous petitioner's reliance on this case for the proposition that comparison of aspects of the former and potential receiving districts is not required as an element of petitioner's burden of proof. Instead, as established in Brielle, supra, the Commissioner requires assurance that the pupils of the several district shall be provided a thorough and efficient education at the time the application comes before the Commissioner.

Moreover, the Commissioner cannot agree with petitioner that Cranbury, supra, lends support for Absecon's contention that the merits of former and proposed receiving districts need not be contrasted as a criterion for termination. Foremost, the State Board made it clear from the outset that Cranbury was decided under

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the statute before amendment. Moreover, Cranbury is factually distinguishable from the instant case and inures against the proposition suggested by petitioner that a new receiver need not be established at the outset of litigation. He so determines based on the limited language included in the State Board's decision on how the amendments would impact on prior cases decided under N.J.S.A. 18A:38-13 and the policy considerations underlying those cases.

In Cranbury, supra, the new receiver, Princeton, was known. Furthermore, racial imbalance was not a key issue therein as it is in this matter. In order for the Commissioner to consider and assess the criteria enumerated under N.J.S.A. 18A:38-13 as amended, he must do so with the guidance from Cranbury that the factors to be considered have not significantly changed by virtue of the amendments to N.J.S.A. 18A:38-13. The Commissioner agrees with the ALJ that prior cases have held that he must consider all relevant factors, "which include the educational impact, financial impact, facilities considerations and racial impact on all pupils and districts involved. Bd. of Ed. of the Township of Washington v. Bd. of Ed. of Upper Freehold Reg. School District [supra]." (Initial Decision, at p. 8) As noted by the ALJ, Washington Township turned on whether the proposed receiving district was overcrowded. The ALJ further stated that the Cranbury case considered facts concerning Princeton, the proposed receiving district. In the instant matter, Absecon provided no concrete information on proposed alternative receivers.

Yet, the Commissioner concurs fully with the ALJ's reliance on Cranbury, supra, in stating:

> It is not possible to address the legislative concern to prevent unwarranted instability when no other district has agreed to be the receiver and when the new statute requires a five-year commitment from the proposed receiving district (N.J.S.A. 18A:38-13.1). I CONCLUDE that Absecon cannot show application of the statutory criteria because it has not presented a resolution officially committing another district to become a receiver for its high school students for the five years subsequent to severance. (emphasis in text) (Initial Decision, ante)

The Commissioner adopts this finding and conclusion as his own and dismisses as being without merit petitioner's exception averring that the ALJ erred in granting summary decision under N.J.A.C. 1:1-12.5 on the basis of Absecon lacking a potential receiving district.

Exception 3 avers that the ALJ erred in granting summary decision under N.J.A.C. 1:1-12.5 before discovery and a feasibility study could be completed. Because the Commissioner concludes, as did the ALJ, on the basis of the undisputed operative facts agreed to by the parties, that as a matter of law Pleasantville has borne its burden of proving substantial negative effect because of racial

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imbalance, the Commissioner need not reach the issue of whether additional discovery is needed before summary decision can be granted. He does note, however, that in any future litigation brought before the Commissioner predicated upon N.J.S.A. 18A:38-13, a feasibility study is mandated at the onset of application to sever. See Cranbury, supra, at pp. 21-22. Accordingly, the Commissioner dismisses Exception 3 as moot.

Exception 4 can be disposed of with brief mention. It claims that the initial decision is not in conformity with the legal standard enunciated by the State Board in Cranbury, supra, and other cases examining student entitlements in receiving a thorough and efficient education. It is petitioner's contention that Cranbury-Lawrence established that the merits of former and proposed receiving districts need not be contrasted as a criteria for termination." (Exceptions, at p. 49) While it is true that the decision emphasized that the sending-receiving relationship is intended to benefit pupils in sending districts, the State Board carefully considered the new receiver's ability to provide a thorough and efficient education to Cranbury's students. In fact, since Princeton was already established as the new receiver, and was included in the discussion repeatedly in comparing the criteria under the old standard for whether to terminate, the Commissioner finds petitioner's suggesting a position to the contrary particularly misguided. His discussion earlier in this decision on past case law dealing with alternative receiving districts is dispositive of this exception. Absecon's exceptions in this regard are thus dismissed as being without merit.

Similarly, the Commissioner dismisses Exception 5 which suggests that the ALJ erred in granting summary decision as to the third count of the Petition of Appeal which deals with the provision of a thorough and efficient education at Pleasantville High School. Petitioner's argument in this regard appears to be predicated on In re Jamesburg, supra. Absecon suggests that "[w]hile it is accurate to say that the Washington Township case cited by the ALJ relieved petitioners in sending-receiving cases of the responsibility of proving that the receiving district was not providing a thorough and efficient education, it does not follow that a petitioner seeking to close a school should be prohibited from introducing evidence on the T&E issue." (emphasis in text) (Exceptions, at p. 62) Petitioner faults the ALJ for the comment made at oral hearing on respondent's Motion for Summary Decision, "Nor do I have anything to do with closing that high school." (Tr. March 14, 1988, at p. 7) The Commissioner agrees with the ALJ that the issue of closing Pleasantville High school and either merging its students with other local districts or compelling regionalization is not properly made part of the instant matter, since those alternatives proffered by Absecon are merely in the speculative stage. Thus, the Commissioner is in accord with the ALJ that the issue of closing Pleasantville High School is not before him currently and that any evidence on the thorough and efficient issue in conjunction with such a closing is "surplusage." The Commissioner adopts as his own the ALJ's finding in this regard and dismisses petitioner's Exception 5 as being without merit.

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Exceptions 6 and 8 were disposed of at the outset of this decision. Exception 7 appears to be a summary of petitioner's arguments, and states: "The initial decision serves to foster segregation rather than integration for Pleasantville High School in the future." (Exceptions, at p. 66)

As noted earlier in this decision, the Commissioner recognizes in this matter the immediate negative impact that withdrawal of the Absecon population from Pleasantville High School would cause. The statistics petitioner relies on as mentioned earlier are projections of actual white pupil enrollments at Pleasantville High School, not projections of Absecon students eligible to attend Pleasantville High School. The Commissioner addressed this interpretation of the statistics earlier in this decision. He finds, therefore, that petitioner's belief that "[t]he solution is not to keep Absecon in an unproductive sending-receiving relationship but to build a record in an evidential hearing so that an appropriate remedy may be fashioned" (Exceptions, at pp. 66-67) misses the mark. The Commissioner is in accord with the ALJ in concluding that "Pleasantville has carried its burden of demonstrating that no matter how favorable all other factors to be considered might be to Absecon's cause of action, it cannot overcome the negative effect of rendering Pleasantville's High School students racially isolated." (See Initial Decision, ante) Thus a change of high school designation must be denied. Moreover, the Commissioner further agrees that severing the sending-receiving relationship in this matter "must also be denied on the basis that no other school district has agreed to accept Absecon's students so that it is not possible to apply the statutory standard to determine the effects of a change on the children in each concerned district." (Initial Decision, ante)

Finally, the Commissioner adopts as his own the comments proffered by the ALJ at the last paragraph of page 11 of the initial decision concerning Absecon's options. He encourages Absecon and Pleasantville to continue in their regionalization study.

Accordingly, the Motion of the Board of Education of Pleasantville for Summary Decision dismissing the petition of the Absecon Board is granted based upon the conclusions and findings of the initial decision, as supplemented herein. The Petition of Appeal is hereby dismissed with prejudice.

COMMISSIONER OF EDUCATION

June 1, 1988

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BOARD OF EDUCATION OF THE CITY OF ABSECON,

PETITIONER-APPELLANT.

V.

BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, June 1, 1988

For the Petitioner-Appellant, Shore & Zahn
(Cynthia P. Liebling, Esq., of Counsel)

For the Respondent-Respondent, James L. Jackson, Esq.

This is an appeal from a summary dismissal by the Commissioner of the petition of the Board of Education of the City of Absecon, by which Absecon sought to terminate its sending-receiving relationship with the Board of Education of the City of Pleasantville. For the reasons that follow, we affirm the Commissioner's determination to dismiss the petition.

Although Absecon seeks through these proceedings approval to terminate its current sending-receiving relationship so as to send its students elsewhere, it has provided no alternative receiver. This failure is not merely technical in that Absecon concedes that its does not have an alternative receiving district and maintains that it need not provide one in order to be entitled to litigate this matter and to be permitted to terminate its current relationship.

Although the Administrative Law Judge (ALJ) and the Commissioner rested their summary determinations to deny termination on their conclusions that Pleasantville had demonstrated significant negative racial impact were Absecon to be permitted to terminate the relationship, both found that Absecon's failure to provide an alternative made it impossible to apply the statutory standard to determine the effects of a change in receivers on the children of each district concerned.

We agree, and find that Absecon's failure in this case fatal to its application. The language of N.J.S.A. 18A:38-13 clearly contemplates that a sending district provide its proposed alternative for educating its students when it seeks withdrawal or change in designation. Furthermore, at minimum, it is the obligation of the State Board of Education to insure that the

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students of the sending district will have an educational alternative, and to permit withdrawal in the absence of a demonstrated alternative would contravene that responsibility. Accordingly, the State Board of Education will not direct termination without knowing where the senders' children are to be educated. See Board of Education of the Township of Cranbury v. Board of Education of the Township of Lawrence, decided by the State Board, April 1, 1987, appeal dismissed by the Appellate Division, April 22, 1988.

Moreover, as found by the ALJ and the Commissioner, Absecon's failure to provide a potential receiving district makes it impossible to evaluate the racial impact on all districts that would be effected were Absecon to terminate its relationship with Pleasantville. While not essential to our decision, and while our disposition of this matter does not require us to address Pleasantville's allegations concerning racial impact, we note that Absecon's failure to fulfill its statutory obligation to prepare and submit a feasibility study is related to its failure to provide an alternative receiver in that the absence of a feasibility study would make it extremely difficult to evaluate such impact. The complete absence of an alternative makes this assessment impossible so as to warrant dismissal of the petition.

We find that oral argument is not necessary to arrive at a fair determination in this case, and, for the reasons stated, we affirm dismissal of the petition.

October 5, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8704-87
(remand of EDU 3803-87)
AGENCY DKT. NO. 122-5/87

BOARD OF EDUCATION OF CITY OF PATERSON,
Petitioner,
and
MELINDO PERSI, PASSAIC COUNTY SUPERINTENDENT OF SCHOOLS,
Co-Petitioner,
(at direction of the Commissioner),
v.
CITY COUNCIL OF THE CITY OF PATERSON,
Respondent.

Robert G. Rosenberg, Esq., and **Herman Steinberg,** Esq., for petitioner

Marlene Zuberman, Deputy Attorney General, for co-petitioner
(W. Cary Edwards, Attorney General of New Jersey, attorney)

Jessica G. de Koninck, Assistant Corporation Counsel, for respondent
(Ralph L. DeLuccia, Jr., Corporation Counsel, City of Paterson)

Record Closed: March 16, 1988 Decided: March 18, 1988

BEFORE: **WARD R. YOUNG, ALJ:**

The matter was remanded by the Commissioner of Education to determine what portion of the $2,452,288 budget reduction sustained in the Initial Decision of October 29, 1987 (EDU 3803-87), if any, must be restored to enable the Board of Education to provide its pupils with a thorough and efficient program of education.

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The remand was transmitted to the Office of Administrative Law as a contested case on December 31, 1987. A prehearing conference was held on January 21, 1988, and a plenary hearing was held on March 14 and 15. The record closed with the filing of memoranda of law on behalf of co-petitioner Persi and the respondent City Council on March 16, 1988.

I.

A summary of findings and conclusions in the matter initially docketed as EDU 3803-87 and incorporated at page 22 of the Initial Decision decided on October 29, 1987 were as follows:

	Council Reductions	Amount Restored	Amount Sustained
Instruction	$4,200,000	$2,167,209	$2,032,791
Other Instruction	200,000	107,963	92,037
Attendance	100,000	100,000	-0-
Health	200,000	200,000	-0-
Plant	300,000	195,000	105,000
Equipment	200,000	150,000	50,000
Retirement	100,000	-0-	100,000
Activities	100,000	27,540	72,460
Special Projects	300,000	300,000	-0-
Total	$5,700,000	$3,247,712	$2,452,288

The Commisisoner affirmed the restoration of $3,247,712 and certified that amount in current expense appropriations to the Passaic County Board of Taxation to be made available to the Paterson School District for the 1987-88 school year, thereby increasing the total current expense appropriations certified to $32,649.502.

The remand by the Commissioner directed that the Passaic County Superintendent of Schools be made a party to these proceedings because of his vital role in the budgetary approval process; his evaluative role of the performance of each public

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school district pursuant to N.J.A.C. 6:8-4.1 et seq.; his delegated responsibility to assist local school districts to achieve full certification; and the Level III status of the Paterson School District. An additional reason for the remand was the Commissioner's judgment of the unacceptability of the Board's determination to accept certain reductions by stipulation without additional testimony from its own responsible school officials, notwithstanding that six Board witnesses failed to assist the Board in meeting its burden of proof by a preponderance of credible evidence that the amounts sustained by stipulation must be restored to enable the Board to provide a thorough and efficient program of education for its pupils.

II.

It was determined at the prehearing conference held on January 21, 1988 that the County Superintendent of Schools would not be precluded from testifying on any budget line item, but that the Board would be precluded from adducing further testimony on line items 214A, 250C, and 1010 as the initial decision concerning those line items was based on the board's proofs, and not by stipulation. In my review of the procedures to be followed prior to the opening of the record, the Board objected to its preclusion from adducing testimony on line items 214A, 250C, and 1010. The objection was overruled based on N.J.A.C. 1:1-13.2(b), which states that "Any party may, upon written motion filed no later than five days after receiving the prehearing order, request that the order be amended to correct errors." The second reason given for the ruling is that the Commissioner's intention in remanding the matter, as it relates to the Board, was to provide the opportunity for the Board to adduce testimony from its officials on the line items determined by stipulation.

The City Council made application on Motion to adjourn the hearing on the basis that its Motion for Stay of the Commissioner's decision would be decided by the State Board on April 6 as the Legal Committee would be rendering its recommended decision on March 16. The motion was denied because the matter pending before the State Board was deemed by the undersigned to be insufficient reason for any further delay in the disposition of the budget controversy. N.J.A.C. 1:1-14.10(i).

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III.

Melindo Persi, Passaic County Superintendent of Schools, testified that the Paterson school district was deemed to be unacceptable in 21 of 51 indicators in the evaluative process; is the only school district in the State of New Jersey to fail to develop a remedial plan; and has been on Level III since June 1987.

Persi further testified that the budgetary procedures employed by the Board were entirely out of time, and his approval of the Board's revised budget of $118,453,975, which was at cap, was for advertising purposes only, and that further review for adequacy would be made by line items through the questionnaire process. See, R-5.

It was also stated by Persi that the budgetary needs by line items, as indicated in his testimony, resulted from the information he secured from the Board's internal auditor, Mr. Tudda, excepting where otherwise noted.

IV.

TOTAL OF INSTRUCTIONAL SALARIES

Council reduced the Board's proposed appropriations by $4,200,000. The Initial Decision restored $2,167,209 and sustained $2,032,791. Each line item will be separately addressed as to the amount sustained.

212: $134,016 was sustained. Persi testified that his investigation revealed the Board does not have any need for further restoration in order to meet its obligations. Tudda also testified there is no further need. The sustained amount of $134,016 is **REAFFIRMED.**

2.3.1: $1,720,000 was sustained. Persi testified that he was advised by Tudda of the need for further restoration of $676,575 in order for the Board to meet its obligations in this line item. Tudda testified that the additional need has resulted from a revised and

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now more accurate projection of compensatory costs in this line item. I **FIND** the testimony to be credible. $1,043,425 is **SUSTAINED**, and the amount of $676,575 is hereby **RESTORED.**

214A: $100,000 was sustained. Persi testified there was no mandate for the employment of more elementary librarians in his July 6, 1987 communication to Superintendent Napier and Secretary Migliaccao. See, P-10. He further testified that the $120,000 remaining in this account to employ more librarians (because it was not reduced by Council) was rededicated by the Board to reduce its deficit. No testimony was adduced from Tudda as the determination in the Initial Decision was based on the Board's proofs and not by stipulation. I **FIND** no rational basis for further restoration. The sustained amount of $100,000 is **REAFFIRMED.**

214C: $78,775 was sustained. Persi testified that restoration is needed because of program inadequacy due to an immense backlog of special education referrals and cyclical reevaluations, while conceding he does not know what the Board would do with the money if it were to be restored. The need, he states, could be partially met by use of these additional funds to employ part-time staff during the remainder of the school year and possibly in July and August (as an encumbered account) to reduce the special education backlog. Tudda testified that no restoration is needed for the Board to meet its compensatory obligations to its present staff.

It is already established that the Paterson district is uncertified and has been at Level III since July 1987. The failure of the Board to meet the needs of its special education pupils should not impact detrimentally to those pupils if a means can be found to mandate that those needs be met.

Notwithstanding the generally accepted concept that budget disputes do not require or anticipate budget restructure, the Commissioner is nevertheless not without authority to mandate that a local board of education provide a program of thorough and efficient education for its pupils. The finding of special education program inadequacy by the County Superintendent is sufficient proof that the Paterson Board has failed to do so

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for its special education pupils at least insofar as its backlog of needed services for special education pupils is concerned.

The amount of $78,775 is hereby **RESTORED.** Said amount shall be deemed to be non-transferrable from this account, and shall be dedicated solely for the employment of personnel to reduce the backlog indicated by Persi. Failure of the Board to comply with the terms of restoration shall result in the utilization of any amount remaining in this account as surplus funds to reduce the amount to be raised by taxation for the 1988-89 school year. **IT IS SO ORDERED.** The legal basis for this determination shall be addressed, infra.

OTHER INSTRUCTION

$92,037 was sustained in the Initial Decision in line item 250C, which was determined by the Board's proofs. Teacher-course reimbursement is the only issue. Persi testified tnat he was advised on Saturday, March 12 by Tudda that the Board's need on that date was $272,000 and that the Board erred in its proofs during the September hearings. He further stated that his testimony was based solely on the Board's representation (by Tudda) but he had no knowledge of the number of teachers or courses for reimbursemnt.

A review of the findings related to this account in the Initial Decision and the vague testimony of Persi is convincing that the co-petitioner has failed to meet his burden of proof by a preponderance of credible evidence that any further restoration is warranted. **I SO FIND.** The $92,037 sustained in the Initial Decision is **REAFFIRMED.**

OPERATION OF PLANT

630: $55,000 was sustained. Persi testified his investigation revealed that no restoration was needed for the Board to meet its heating bills. Tudda concurred in his testimony. The $55,000 sustained in the Initial Decision is **REAFFIRMED.**

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640: $50,000 was sustained. Persi testified that he was advised by Tudda that the projected expenditures for costs of utilities required the restoration of the total amount. Tudda testified that his communication to Persi was an inadvertent error and that there was no need for any restoration to enable the Board to meet its obligation to pay for costs of utilities. The $50,000 sustained in the Initial Decision is **REAFFIRMED.**

REPLACEMENT OF EQUIPMENT

730: $50,000 was sustained. Persi testified he had no information on this account. Tudda testified that no further restoration is needed for the Board to meet its obligation. The $50,000 sustained in the Inditial Decision is **REAFFIRMED.**

EMPLOYEE RETIREMENT

810: $100,000 was sustained. Persi testified that no restoration was needed in this account. Tudda concurred in his testimony. The $100,000 sustained in the Initial Decision is **REAFFIRMED.**

ACTIVITIES

1010: $72,460 was sustained. Persi testified that restoration plus additional funding was necessary as the Board's total need in this account is $375,000. (The Board appropriated a total of $328,000 in its budget). On cross-examination, Persi testified that his line item review of the Board's proposed budget did not generate any questions concerning this line item that were incorporated in his questionnaire of 19 pages attached to his letter of March 2, 1987 to Superintendent Napier and secretary/SBA Riley. See, R-5.

A review of the Initial Decision at pages 17, 18, and 19 reveals that the determination therein based on the Board's proofs was most liberal in arriving at the Board's needs.

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The bald statement of need adduced in the testimony of Persi without supporting specificity cannot be construed herein as meeting a burden of proof by a preponderance of credible evidence to warrant further restoration. **I SO FIND.** The $72,460 sustained in the Initial Decision is **REAFFIRMED.**

V.

THE LAW

The authority of the Commissioner of Education to oversee and ascertain the thoroughness and efficiency of the public schools in the State of New Jersey can hardly be disputed. Nor can his constitutional duty to take corrective steps, when deemed necessary, to ensure compliance with public policies to provide for the maintenance and support of a thorough and efficient system of free public schools for all eligible children of this State. N.J.S.A. 18A:4-21 et seq. N.J.S.A. 18A:7A-1 et seq. Jenkins v. Morris Tp. School Dist., 58 N.J. 483, 279 A.2d 619 (1971). New Jersey Constitution. Art. VIII, sec. IV, par. 1.

Guidelines and standards of review in budget disputes and the role of the Commissioner were emphasized in Bd. of Ed., E. Brunswick Tp. v. Tp. Council, E. Brunswick, 48 N.J. 94 (1966). The Commissioner's 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" (at 106). Justice Jacobs also stated at 107: "As in Booker, the Commissioner in deciding the buoget dispute here before him, will be called upon to determine not only the strict issue of arbitrariness but also whether the State's educational policies are being properly fulfilled. Thus, if he finds that the budget fixed by the governing body is insufficient . . ., he will direct appropriate corrective action . . ."

I **FIND** the law of this case mandates the paramount interest to be the children of the Paterson school district.

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VI.

Arguments of counsel, eloquently expressed, were epeditiously filed on behalf of co-petitioner Persi and the respondent Board. They have been addressed above in what is perceived to be the law of the case, and are incorporated herein by reference.

VII.

SUMMARY OF FINDINGS AND CONCLUSIONS

	Amount Initially Sustained	Amount Restored	Amount Sustained
Instruction	$2,032,791	$ 755,350	$1,277,441
Other Instruction	92,037	-0-	92,037
Plant	105,000	-0-	105,000
Equipment	50,000	-0-	50,000
Retirement	100,000	-0-	100,000
Activities	72,460	-0-	72,460
Total	$2,452,288	$ 755,350	$ 1,696,938

I **CONCLUDE** that an additional amount of $755,350 shalll be certified to the Passaic County Board of Taxation in current expense appropriations to be made available to the Paterson school district for the 1987-88 school year. This amount, when added to the original current expense tax levy appropriation of $29,401,790 and the $3,247,712 previously certified by the Commissioner in his decision of December 24, 1987, shall total $33,404,852 in current expense appropriations certified to be raised for school purposes for the 1987-88 school year.

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This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Commissioner Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

18 March 1988
DATE

Ward R. Young
WARD R. YOUNG, ALJ

Receipt Acknowledged:

MAR 23 1988
DATE

Seymour Weis
DEPARTMENT OF EDUCATION

Mailed To Parties:

MAR 23 1988
DATE

Ronald L. Parlin
FOR OFFICE OF ADMINISTRATIVE LAW

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BOARD OF EDUCATION OF THE CITY OF PATERSON,	:	
PETITIONER,	:	
AND	:	
MELINDO PERSI, PASSAIC COUNTY SUPERINTENDENT OF SCHOOLS,	:	
CO-PETITIONER, (at direction of the Commissioner),	:	COMMISSIONER OF EDUCATION
	:	DECISION ON REMAND
V.	:	
CITY COUNCIL OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	
RESPONDENT.	:	
	:	

The Commissioner has reviewed the record of this matter including the initial decision on remand rendered by the Office of Administrative Law.

It is observed that respondent (Council) has filed exceptions to the initial decision pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

In its exceptions Council advances three points in which it takes issue with the initial decision:

1. The Administrative Law Judge erred in restoring $676,575.00 to the 213.1 budget line.

2. The Administrative Law Judge erred in restoring $78,775.00 to the 214C budget line.

3. The Administrative Law Judge erred in denying Council's motion to adjourn the hearing pending a decision by the State Board of Education on the motion for stay.

Council argues that there was no basis for the ALJ in his initial decision on remand to restore those amounts in current expense appropriations to the local tax levy set forth in line items 213.1 (Salaries of Teachers other than Bedside and Supplementary) which amounts to $676,575, or the amount of $78,775 set forth in line item 214C (Salaries of the Basic Child Study Team). In support of its reasoning, Council relies on certain sections of the

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transcripts of the testimony of Passaic County Superintendent, Mr. Persi, and the Board's Internal Auditor, Mr. Tudda. (Tr. 3/15/88, Exhibit C; Tr. 3/14/88, Exhibit F; Tr. 3/15/88, Exhibit G)

Council argues that the testimony of these witnesses is nothing more than hearsay unsupported by any documentation in the record to justify the ALJ's restoration of these controverted appropriations to the Board's 1987-88 school budget.

Finally, Council argues that the ALJ's failure to grant its motion to adjourn the hearings in this matter pending the outcome its motion for a stay of the Commissioner's original decision (decided December 24, 1987) was unreasonable and offended the regulatory scheme of due process.

The Commissioner has reviewed those exceptions to the initial decision on remand filed by Council including the relevant sections of the transcripts of the hearings attached thereto.

In the Commissioner's judgment, Council's exceptions to the additional current expense tax levy restorations of $676,575 in teachers' salaries (J-213.1 - Teachers other than Bedside and Supplementary) and the additional amount of $78,775 in Salaries of the Basic Child Study Team (J-214C) are without merit.

It must be noted at this juncture that although Council's original overall reduction of $4,200,000 in total instructional salaries did not identify each of the line items within the J-200 series to be affected by such reductions, Council's reasons for these reductions were equally vague insofar as they did not identify teachers' salaries (J-213.1) as the basis for its recommended reduction. Moreover, Council's reasons for its reductions in the J-200 series included salaries of personnel who did not fall within the teachers' salaries line item appropriations.

More specifically, the reasons advanced by Council for its reductions of "Total of Instructional Salaries" stated the following:

> The Council believes that the educational system has become overburdened with excess administrative and non-classroom personnel which has lessened the quality of education." (emphasis supplied)
> (Initial Decision of October 29, 1987, at p. 2)

Notwithstanding the above, the Commissioner did review the J-213.1 line item (teachers' salaries) in an effort to determine what amounts, if any, could be reduced in the local tax levy. In this regard the Commissioner is satisfied from a review of the record of these proceedings that the Board, as well as the Passaic County Superintendent, has provided a sufficient basis for the Commissioner to conclude that an additional amount of $676,575 be restored to the tax levy for the 1987-88 school year in the J-213.1 account (teachers' salaries).

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The Commissioner finds to be equally without merit Council's exceptions to the restoration of the additional amount of $78,775 in the J-214C line item to the local tax levy. In the Commissioner's judgment this amount for the salaries of the Basic Child Study Team must be made available to the Board for the 1987-88 school year in order to permit the Board to reduce its current backlog of special education referrals and reevaluation of pupils who may require special education programs.

The restoration of this amount to the local tax levy is made by the Commissioner by virtue of the fact that Paterson is classified as a Level III school district in the State's Evaluation and Monitoring process and is contingent upon the following finding and recommendation made by the ALJ in the initial decision which the Commissioner affirms and hereby adopts as his own:

> The amount of $78,775 is hereby RESTORED. Said amount shall be deemed to be non-transferrable from this account, and shall be dedicated solely for the employment of personnel to reduce the backlog indicated by Persi. Failure of the Board to comply with the terms of restoration shall result in the utilization of any amount remaining in this account as surplus funds to reduce the amount to be raised by taxation for the 1988-89 school year. (Initial Decision on Remand, ante)

Additionally, the Commissioner finds equally without merit the contention of Council that the testimony of the county superintendent represents mere hearsay and is unsupported by documentary evidence. In response to said assertion, the Commissioner calls particular attention to the statutory role of the county superintendent as the Commissioner's designee in meeting the requirements of N.J.S.A. 18A:7A-28 which requires the Commissioner to "***review each item of appropriation within the current expense and budgeted capital outlay budgets and *** determine the adequacy of the budgets with regard to the annual reports submitted pursuant to section 11 of this act [18A:7A-11]." Therefore, in light of the aforesaid statutory authority as well as the special role required of the county superintendent in monitoring the corrective action plan required of the Paterson School District by virtue of its failure to have been certified after two levels of monitoring, the Passaic County Superintendent's knowledge of both the budget itself and the special needs of the district must be accorded significant credibility. The Commissioner so finds.

Finally, the Commissioner rejects Council's argument with regard to its claim that the ALJ acted in an unreasonable and unjustified manner in denying its motion to adjourn the hearings on remand until the State Board rendered its decision on Council's Motion to Stay the Commissioner's decision of December 24, 1987. The record establishes that the Commissioner had originally denied Council's Motion for a Stay of his earlier decision which it then appealed to the State Board.

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The Commissioner finds that the ALJ properly denied Council's Motion to Adjourn by virtue of the fact that the Commissioner had directed in his decision on remand of December 24, 1987 that "such proceedings [before OAL] must be scheduled on an expedited basis." (Slip Opinion, at p. 39)

Accordingly, the Commissioner hereby adopts as his own the findings and recommendations in the initial decision on remand in this matter. The Commissioner hereby finds and determines that an additional amount of $755,350 shall be certified to the Passaic County Board of Taxation in current expense appropriations to be made available to the School District of the City of Paterson for the 1987-88 school year. This amount of $755,350 when added to the original current expense tax levy appropriation certified by Council of $29,401,790 and the $3,247,712 previously certified by the Commissioner on December 24, 1987 shall total $33,404,852 in current expenses certified to be raised for school purposes for the 1987-88 school year.

The Commissioner hereby directs the Passaic County Board of Taxation to make the necessary local tax levy adjustments for the School District of the City of Paterson for the 1987-88 school year to conform with this decision.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

June 2, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5590-87
AGENCY DKT. NO. 227-7/87

YVONNE MELI,
Petitioner,
v.
BOARD OF EDUCATION OF THE BURLINGTON COUNTY VOCATIONAL-TECHNICAL SCHOOL,
Respondent.

Allison E. Accurso, Esq., for petitioner (Katzenbach, Gildea & Rudner, attorneys)

John E. Queenan, Jr., Esq., for respondent

Record Closed: March 9, 1988 Decided: April 21, 1988

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

Yvonne Meli, petitioner, appeals the decision of the Burlington County Vocational-Technical Board of Education to withhold her salary and adjustment increments for the 1987-88 school year.

This matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. After notice, a prehearing conference was held and, among other things, it was settled that the issue to be resolved is whether the controverted withholding was properly effected and, if not, to what relief the petitioner is entitled.

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Per the prehearing order, the parties submitted an eight-part stipulation of facts and stipulated 36 documents into evidence either by consent or without objection. Subsequently, the parties jointly contacted me and represented that all material facts had been stipulated. Accordingly, I adjourned the hearing scheduled for January 28 and 29, 1988, and the matter proceeded on the papers.

STIPULATED FACTS

1. Yvonne Meli has been employed a a teacher within the respondent district from September 1971 to the present.

2. Petitioner is certificated with a full comprehensive teaching certificate.

3. On April 28, 1987, respondent voted to withhold petitioner's employment adjustment and increments for the contract period of 1987-88.

4. By letter dated April 29, 1987 from Benjamin V.P. Verdile, petitioner was advised of the purported reason for respondent's action of April 28, 1987. Petitioner was advised that respondent's sole reason for withholding her employment increment and adjustment was "attendance."

5. Petitioner was absent 15 and one-half days prior to respondent's decision to withhold her employment increment and adjustment for the contract period of 1987-88. Petitioner missed 12 and one-half days due to sickness, one day due to a death in her family and two days for personal reasons. After respondent voted to withhold petitioner's increment, petitioner missed an additional day during the 1986-87 school year to attend the funeral of a close friend.

6. Each of petitioner's absences was legitimate and approved by respondent.

7. During the 1986-87 school year, petitioner was entitled to 15 and one-half sick days, 10 days pursuant to statute and five and one-half days carried over from the 1985-86 school year. These additional five and one-half sick days were the result of her carrying over three and one-half unused sick

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days and two unused personal days which, under Article XII of the collectively bargained contract, become available as additional sick days.

8. Petitioner's 15 and one-half days of absence prior to respondent's decision to withhold her increment as well as the additional personal day taken after the increment withholding during the 1986-87 school year were within her statutory and contractual allowance pursuant to N.J.S.A. 18A:30-3 and Article XII of the 1985-88 collectively bargained contract.

PETITIONER'S ARGUMENTS

The petitioner argues that the Board's action withholding her employment and adjustment increments based upon absenteeism was arbitrary, capricious and unreasonable. It is a well-settled principle of New Jersey education law that a board has good cause to withhold an increment based on absenteeism only if it determines that the teacher's absences have had an adverse effect on his or her performance; that is, where teacher effectiveness is diminished or discontinuity of instruction results negatively on student development. Meli v. Bd. of Ed. of Burlington County Vocational-Technical School, OAL DKT. EDU 4515-84; (Jan. 28, 1985), rev'd, Comm'r of Ed. (Mar. 15, 1985), rev'd, State Board (Dec. 4, 1985), aff'd (N.J. App. Div., Mar. 4, 1987, A-2237-85T7) (unreported) (Meli II).

A board's decision to withhold a salary increment based only on the number of days of absence, without considering the particular circumstances of each absence, is not good cause as required by N.J.S.A. 18A:29-14. Meli II, above; Montville Tp. Ed. Ass'n v. Montville Tp. Bd. of Ed., OAL DKT. EDU 8247-83 (Feb. 29, 1984), rev'd (Apr. 16, 1984), rev'd, State Bd. (Nov. 7, 1984), rev'd, Superior Court (N.J. App. Div., Dec. 6, 1985, A-1178-84T7) (unreported); Kuehn v. Bd. of Ed. of Tp. of Teaneck, 1981 S.L.D. 1290, rev'd Comm'r of Ed., 1981 S.L.D. 1299, rev'd, State Board (Feb. 1, 1983). See also, Law v. Parsippany-Troy Hills Bd. of Ed., OAL DKT. EDU 3754-80 (Sept. 9, 1981), rev'd, Comm'r of Ed. (Oct. 26, 1981), rev'd, State Board (Aug. 4, 1982), aff'd (N.J. App. Div., Oct. 25, 1983, A-280-82T2) (unreported) for the proposition that a teacher's absences do not constitute excessive absenteeism where they are legitimate and do not lead to a discontinuity of instruction.

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Accordingly, in the petitioner's view, the sole issue before this tribunal is whether the Board had a reasonable basis, considering the information before it, to support the determination that good cause existed to withhold the petitioner's employment and adjustment increments based solely on absences. The petitioner acknowledges that she bears the burden of proof that the underlying facts are not as claimed by the Board and that the Board acted unreasonably in withholding the increment on the basis of those facts. Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288 (App. Div. 1960). In the present case, the facts are uncontested. The petitioner's absences during 1985-86 were legitimate and were within her statutory and contractual entitlements. She alleges that, as in previous years, the Board neither considered the particular circumstances of the absences nor the effect of the absences on her pupils, notwithstanding that on March 4, 1987, the Appellate Division affirmed the State Board's decision that the respondent's failure to consider the circumstances of the petitioner's absences, as well as the number, and the lack of any evidence that her absences disrupted the educational process, rendered void the Board's 1984-85 withholding. Meli II.

The Board's failure to consider the particular circumstances of the petitioner's absences requires the Commissioner to restore the withheld increments. The cases cited above establish that a board of education is required to consider the particular circumstances of a teacher's absences prior to withholding an increment. In the present case, it is obvious that the Board never considered the particular circumstances behind the petitioner's absences, even in light of the State Board's specific direction arising out of the respondent's 1984-85 withholding:

> [W]hile a board may withold an increment because of unsatisfactory attendance even where there is legitimate medical excuse, it is required to consider the circumstances of the absences as well as the number. (Slip opin. at 5.)

The Board failed to consider whether the petitioner's absences led to a discontinuity of instruction. Meli II, above; Trautwein v. Bound Brook Bd. of Ed., 1980 S.L.D. 1539 (N.J. App. Div., April 8, 1980), A-2773-78) (unreported), certif. den. 84 N.J. 469 (1980). In the instance of the present withholding, the Board has not presented any evidence that it considered the circumstances of the petitioner's absences or their effect, if any, on her pupils. This failure to determine whether the absences disrupted the educational process led to the reversal of the respondent's 1984-85 increment withholding.

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Meli II. Now again, the Board can point to no evidence presented to it at or prior to its April 28, 1987 meeting concerning the possible negative effect on pupils of the petitioner's absences. The absences were legitimate and within the petitioner's statutory and contractual entitlements. Nothing in the record reveals that her absences in 1986-87 disrupted the educational process.

The Board's withholding penalized the petitioner for legitimate use of statutorily provided sick leave and contractually provided personal leave. At the time of the withholding, the petitioner had been absent from teaching a total of 15.5 days. She was absent 12.5 days because of sickness, one day because of a death in the family and two days for personal reasons. The use of sick leave for proper purposes may not be subject to a penalty. Similarly, the Board may not penalize the petitioner for her use of personal days which are allowed by the collective bargaining contract. To permit the Board to withhold petitioner's increments for the 1987-88 school year based on proper use of sick leave and personal leave is arbitrary and unreasonable.

BOARD'S ARGUMENTS

The Board asserts that its action withholding the petitioner's increments based upon absenteeism is a proper act which it has taken with good cause. N.J.S.A. 18A:29-14 provides, in pertinent part, that a board may withhold, for good cause, the employment increment or the adjustment increment or both of any teaching staff member in any year. It is stipulated that the respondent was absent 15 and one-half days within the school year 1986-87 and that all absences were legitimate.

The Commissioner of Education has held that excessive absences, even if for legitimate reasons, are detrimental to an educational program, Trautwein, above; Angelucci and Nehemiah v. West Orange Bd. of Ed., 1980 S.L.D. 1066.

In Angelucci, the Commissioner discussed the allegation that a teacher who, when present, was outstanding in her classroom performance, would have no detrimental effect on her students by reason of her repeated absence when he stated:

> Assuming, arguendo, that as stated the absences of the teachers involved have no adverse effect on their pupils what limit might be expected to be drawn, if any. Could the teachers not be

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> present at all during the year and still have their absence have no impact on the pupils. The teachers herein involved are admittedly of outstanding ability with resultant good evaluations. Such characteristics must have accrued to the teacher when present in the classroom and actively involved with pupils, not absent from that classoom no matter how legitimate the reason. The Commissioner further determines that the argument that the teachers' absences did not lessen their performance improperly places the burden of proof on the Board, rather than the teacher where it belongs.
>
> The Commissioner can only sympathize with teachers who suffer from debilitating illness but cannot agree that the continued absence of any teacher has no effect on the pupils. If such be true, the Commissioner is constrained to wonder the need for the presence of the teacher at all, which wonderment reduces to a legal absurdity. Wade v. Empire Dist. Electric Co., 98 Kan. 366, 158 P. 28, 30. [Id. at 1077-1078.]

The petitioner claims that the absences had no effect on the pupils and did not lead to a discontinuity of instruction. However, in Virgil v. West Orange Bd. of Ed., 1981 S.L.D. 1, one of the qualified school administrators called by the board in a similar case expressed his view that absences disrupt the continuity of the educational program. An intermittent pattern of repeated absences is more detrimental to the learning process than a single continuous absence for an equivalent length of time. Id. at 4.

In Tenure Hearing of Reilly, 1977 S.L.D. 403, the first charge was that Reilly was guilty of inefficiency in that her irregular attendance precluded an efficient teaching program. Dealing with that charge, the Commissioner stated at 414:

> Frequent absences of teachers from regular classroom learning experiences disrupt the continuity of the instruction process. The benefit of regular classroom instruction is lost and cannot be entirely regained, even by extra effort, when the regular teacher returns to the classroom. Consequently, many pupils who do not have the benefit of their regular classroom teacher frequently experience great difficulty in achieving the maximum benefit of schooling. Indeed, many pupils in these circumstances are able to achieve only mediocre success in their academic program. The entire process of education requires a regular continuity of instruction with the teacher directing the classroom activities and learning experiences in order to reach the goal of maximum educational benefit for each individual pupil. The regular contact of the pupils with their assigned teacher is vital to this process.

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The Board suggests that it cannot furnish the petitioner with medical assistance other than a physical examination. She should seek medical help herself to remedy her occasional absences. The petitioner was absent for approximately nine percent of the school year.

DISCUSSION AND DETERMINATION

The logic of the passages cited by the Board cannot be denied. Nevertheless, I must be guided by the more recent decisions of the State Board of Education and the Appellate Division in the petitioner's appeal concerning the withholding of her increments for the 1984-85 school year because of "absenteeism," discussed above. In that matter, as in the present case, the Board adopted a resolution upon the superintendent's recommendation. The petitioner then was informed that her increment had been withheld because of absenteeism.

The State Board, later affirmed by the Appellate Division, in its slip opinion discussed the initial decision, reciting the ALJ's findings. Briefly stated, he found that this case reflected a clash between the Board's statutory authority to withhold an increment and the petitioner's statutory and contractual rights. He found that both the principal and superintendent were aware of the petitioner's record of absenteeism when they recommended that the Board grant her increment for 1984-85. There was no testimony that the petitioner had abused her leave time in 1983-84, no assertion that her effectiveness was diminished and neither was there any evidence of discontinuity in instruction. Because there was no showing that the superintendent had modified his recommendation, the ALJ concluded that his positive recommendation was before the Board when it acted to withhold the increments. The ALJ further determined that there was nothing in the record to show that the Board evaluated or considered the quality of the petitioner's service before making its decision to withhold the increments. He concluded that absent "such articulated evaluation," the Board had abused its managerial prerogative and that its action was unreasonable.

The Commissioner set aside the ALJ's determination relying, in part, on Trautwein, above. The State Board reversed, examining only (1) whether the underlying facts were as those who made the evaluation claimed and (2) whether it was unreasonable

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for them to conclude as they did based upon those facts. Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288 (App. Div. 1960).

Here, the facts upon which the Board based its decision are uncontested. The Board did not consider the circumstances of the petitioner's absences, as well as the number, when it determined to withhold her increments. Meli II.

The petitioner's absences during 1985-86 were legitimate and within her statutory and contractual entitlements.

In Kuehn v. Teaneck Bd. of Ed., 1981 S.L.D. 1290, rev'd, Comm'r of Ed., 1981 S.L.D. 1300, the State Board stated:

> For the Teaneck Board to determine that the petitioner's absence exceeding 90 days, in and of itself, is sufficient reason for the withholding of increment, without consideration of the particular circumstances for the absences, is arbitrary and without any demonstrative rational basis. [Id. at 4.]

Here, it is uncontroverted that the Board never considered the particular circumstances of the petitioner's absences. I **FIND**, notwithstanding clear instruction from the State Board of Education to the contrary, that the Board in this matter did not consider the particular circumstances for the petitioner's absences.

I further **FIND** that the Board failed to consider whether the petitioner's absences led to a discontinuity of instruction. I make this finding based on a complete absence of any evidence to the contrary. Meli II, above.

In short, there has been a series of cases involving this petitioner in which the withholdings were upheld, overturned, and then, ultimately, overturned again. In the present instance, the petitioner used no leave in excess of statutory or contractual prescriptions. Law v. Parsippany-Troy Hills Bd. of Ed., 1981 S.L.D. 1216, rev'd, Comm'r of Ed., 1981 S.L.D. 1226, rev'd State Bd. (Aug. 4, 1982) (unreported). The State Board's decision states:

> While we recognize that excessive absenteeism may furnish sufficient cause of loss of an increment, we think that, under the circumstances here, Petitioner's absences did not go that

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> far. Not only were they legitimate, but there was no evidence that they led to discontinuity of instruction of petitioner's classes. [Id. at 2.]

I **FIND** that the petitioner's absences constituted the legitimate use of statutorily provided sick leave and contractually provided personal leave.

It is stipulated that she did not exceed any such entitlement. Stipulation 8. In the absence of any showing that the petitioner's teaching was not up to standard and a similar absence of any evidence that her absenteeism led to a discontinuity of instruction, I **CONCLUDE** that the petitioner has shown, by a preponderance of the credible evidence, that the Board's action withholding her increments for the 1987-88 school year were arbitrary, capricious or otherwise proscribed.

Accordingly, I **ORDER** the restoration of the petitioner's increments.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

21 APRIL 88
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt ~~Acknowledged~~:

4/22/88
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

APR 26 1988
DATE

OFFICE OF ADMINISTRATIVE LAW

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YVONNE MELI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BURLINGTON COUNTY VOCATIONAL-TECHNICAL SCHOOL, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon his careful and independent review of the record of this matter, the Commissioner agrees with the findings and the conclusion of the Office of Administrative Law that absent a showing that petitioner's teaching was substandard and a similar absence of any evidence that her absenteeism led to a discontinuity of instruction, petitioner herein has shown, by a preponderance of the credible evidence, that the Board's action withholding her increments for the 1987-88 school year was arbitrary, capricious or otherwise proscribed.

Accordingly, the Commissioner accepts the recommendation of the Office of Administrative Law restoring petitioner's increments and adopts it as the final decision in this matter for the reasons expressed in the initial decision.

COMMISSIONER OF EDUCATION

June 6, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

PARTIAL INITIAL DECISION
OAL DKT. NO. EDU 2505-81
(Redocket of EDU 2902-79 and EDU 2582-79)
AGENCY DKT. NOS. 181-5/79A and
264-7/79A

EDWARD L. LOWICKI,
BRUCE THOMAS AND ALL OTHERS
SIMILARLY SITUATED,
Petitioners,
v.
BOARD OF EDUCATION OF THE CITY
OF JERSEY CITY, HUDSON COUNTY,
Respondent.

Jeffrey Barton Cahn, Esq., for petitioners
(Sills Cummis Zuckerman Radin Tischman Epstein & Gross, attorneys)

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

William A. Massa, Esq., for respondent

Record Closed: March 24, 1988 Decided: April 5, 1988

BEFORE **STEPHEN G. WEISS,** ALJ:

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These are consolidated cases which were filed in 1979 and had their genesis as a result of the prior decision of the Commissioner of Education in Yanowitz, et al. v. Board of Education of the City of Jersey City, 1973 S.L.D. 57, appeal dismissed, 1973 S.L.D. 79. A synopsis of the facts involved in Yanowitz and its particular connection to the instant matters may be found in the discussion contained in the initial decision which Judge Berman issued on January 26, 1981. See, In the Matter of Lowicki and Thomas v. Board of Education of the City of Jersey City, Hudson County, Dkt. EDU 2902-79 and Jersey City Education Association v. Board of Education of the City of Jersey City, Dkt. EDU 2582-79 (consolidated) (Jan. 26, 1981), pp. 2-6.

During the early stages of the instant litigation, prior to Judge Berman's January 1981 decision, the matter was designated by him as a "class action." Notice of that designation was duly given to all known potential class members, together with an exclusion form to be executed by those persons choosing to "opt out" of the class.[1] In his initial decision, Judge Berman essentially found to be improper the action of the Jersey City Board in failing to extend to eligible petitioners the benefits due them as a result of the holding in Yanowitz. At the same time, he also rejected a variety of separate defenses upon which the Board relied to justify its posture, taking special note of the Board's "misleading actions" which he said lulled the employees into a false sense of security. Accordingly, Judge Berman ordered the Board to immediately comply in all respects with Yanowitz as to all petitioners not barred by the statute of limitations. He further ruled that all petitioners who were members of the NJEA at the time the Yanowitz litigation commenced were entitled to the benefits of the Commissioner's orders in that case. Judge Berman's decision subsequently was affirmed by both the Commissioner and the State Board of Education. An appeal by the Board to the Superior Court, Appellate Division, was dismissed in 1982.

---

[1]As a general proposition, "class actions" are not cognizable before the Office of Administrative Law. See, Lukas, et al. v. Department of Human Services, et al., OAL DKT. EDU 9183-81, decided by the Commissioner, January 19, 1983. However, the instant case predated Lukas and, to my knowledge, no one challenged the propriety of the class action designation. See also, N.J.A.C. 1:1-1.3(a). However, in a reply brief filed by the Board on March 23, 1988, this issue was raised and will be discussed infra.

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Thereafter, over the next few years, various delays in enforcing the final decision were occasioned by the efforts being made accurately and comprehensively to identify class members and their exact entitlement status, if any. This state of affairs was due, in large part, to the complicated nature of the case and the large number of potential beneficiaries. In March 1983, Administrative Law Judge Robert Glickman, to whom the matter had been assigned following the death of Judge Berman, signed a "Second Order of Enforcement of Final Decision of State Board of Education," wherein he appointed the accounting firm of Ernst & Whinney to serve as independent auditor. That firm was directed to report back to counsel and the administrative law judge with respect to the proper gross amount of back pay due to, and TPAF and Social Security contributions deductible from, each entitled claimant. The independent auditor further was instructed to ascertain as to each undisputed claimant, for each year of employment, the difference between the amount of gross wages paid to him or her by the respondent and the amount the individual properly should have received had he timely been placed upon the appropriate step of the teachers salary guide and advanced one step for each year of full-time service.

On October 17, 1984, a "Third Order of Enforcement" was entered by Judge Glickman wherein he noted that the independent auditor was continuing to work with all parties and their representatives to identify the appropriate persons entitled to benefits and the amounts, to resolve outstanding issues pertaining to the methodology of computation and to determine whether portions of payments due were affected by either Social Security or TPAF obligations, etc. Given the ongoing administrative activities, Judge Glickman also entered orders of inactivity from time to time.

In 1985 the matter was restored to the active list and reassigned to the undersigned administrative law judge following Judge Glickman's return to the private practice of law. A conference was conducted with counsel and a representative of the accounting firm in October 1985 in order to establish a schedule for finalization of the matter, particularly as to the distribution of monies to "undisputed" claimants. As of that point, in addition to the efforts being made with regard to the administrative aspect of the case, counsel agreed that briefs would have to be filed with respect to an issue regarding the precise

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status of 40 to 50 "pool substitutes" to determine whether they, too, were eligible for relief as class members. Beyond that, other issues which had been included in the original petitions remained to be addressed; namely, assessment of interest, if any, on the eventual award (prejudgment and/or postjudgment), counsel fees, costs and damages.

On January 29, 1986, following a hearing and the submission of briefs, I entered an order determining that 40-50 "pool substitutes" were eligible to enroll in the TPAF and therefore were entitled to share in the Yanowitz award.[2] See, Order re Pool Substitute Teachers, January 29, 1986. The Board then requested interlocutory review of my determination, which was granted. The Commissioner thereafter reversed my order and ruled that jurisdiction of the TPAF could not be ascertained accurately unless I first determined whether pool substitutes were "regular teachers." See, Commissioner of Education, Decision on Motion, March 13, 1986.

As the result of the Commissioner's reversal and remand, it became necessary to take the testimony of the Board's Deputy Superintendent of Schools, which could not be scheduled until June 1986. On August 4, 1986, I issued a partial initial decision in which I determined that, in view of all of the factors developed as the result of the hearings, there was not an adequate basis in the record to determine that the Board's creation of the pool substitute category was the product of any sham or a subterfuge and that pool substitutes must not be considered "regular teachers." That partial initial decision was affirmed by the Commissioner on September 16, 1986.

Over the next several months, counsel, the accountants and representatives of the parties continued to work toward identifying class members entitled to benefits and the amounts due each, if any. In addition, various and sundry other matters were the subject of conferences, motions and/or applications to the court. During this same period, orders were entered directing payment into a previously established trust fund by the Board of several hundred thousand dollars anticipated to be necessary for distribution to eligible claimants. In addition, applications also were made by and on behalf of counsel and the

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[2]This eligibility criterion was one of four identified by Judge Berman as a predicate for recovery. See, Initial Decision, p.6.

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accounting firm for an allowance of fees from the fund, which applications were granted without opposition. Unfortunately, a further delay in distribution was occasioned by the unanticipated illness of a key Board business office employee whose assistance in the administrative aspect of the case had been invaluable. Following her return to good health in late 1987, the mechanics of distribution were expedited. On February 17, 1988, I signed a "Consent Final Judgment and Payment Order as to Enforcement Phase" in which it was agreed that with respect to hundreds of claimants, judgment by consent in the sum of $1,056,866.90 could be entered on the enforcement claims contained in Count 1 against the respondent. Fortunately, an amount equivalent to that total judgment had been set aside in the trust fund (including accrued interest) and was available to cover payment to the undisputed claimants.

Following entry of the consent judgment, counsel were encouraged promptly to meet with appropriate Board officials to ascertain the most manageably expeditious way to distribute proceeds to qualifying claimants. Account had to be taken, of course, of the need to make deductions from each claimant's award to comply with state and federal tax and/or Social Security regulations. The consent judgment further anticipated that I later would receive a report and interim accounting in order to deal with such potential outstanding logistical matters as unclaimed checks, etc.

Finally, the consent judgment specifically noted that it did not address the outstanding claims by petitioners for interest, costs, counsel fees and the status of school nurses. These items were the subject of the posthearing briefs which have now been filed.

DISCUSSION

A. May this case proceed as a "Class Action"?

As I observed in footnote 1, supra, this matter has proceeded since 1980 in a "class action" format and the Board has never challenged the propriety of that designation. Nevertheless, in a reply brief filed by the Board on March 23, 1988 in connection with the issues which are the subject matter of this initial decision, it was belatedly argued for the first time that since there is no authorization for the Office of Administrative Law (hereafter "OAL") to conduct "class actions," the OAL lacks jurisdiction to entertain the

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question of pre- or postjudgment damages. According to the Board, a basic prerequisite for pursuit of a class action requires identification of specific, finite groups of individuals or parties, and it contends that since there is no such ascertainable group in this case, there is no authority for me to entertain the interest issue in a class action context.

Although in its reply brief raising this issue the Board insists it is done as a further demonstration of its "good faith" in this matter, it seems to me that precisely the opposite conclusion can be reached. This matter has been in litigation before the Office of Administrative Law since 1979. The record does not reveal any indication of prior "concern" by the Board that the "class action" designation not only was questionable, but was beyond the very authority of the OAL to entertain. Indeed, the undersigned recalls that on one occasion, during the course of colloquy with counsel at the time the question of the "pool substitutes" was being pursued, I mentioned that having come somewhat late to the case I had a question in my own mind as to how the matter could be a "class action" when such designations normally were not appropriate in the OAL. No side gave any hint of an inclination to pursue the issue at that point. Thus, the fact that the Board now has raised it in its reply brief in March 1988 is, at the very least, somewhat surprising.[3]

In any case, given the entire background and unique circumstances of this case, including in particular the Board's detailed participation in every aspect for about the last nine years without challenge at any level to the class action format, I must reject the untimely contention that because class actions should not be entertained before OAL the question of pre- or postjudgment interest cannot be entertained. This case, in respect to its class action format, is simply sui generis. Moreover, under N.J.A.C. 1:1-1.3(b) I can relax a procedural rule and, if necessary, will do so here for the reasons set forth.

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[3]Similarly surprising is the failure of the Board even to refer to N.J.A.C. 1:1-1.3(a), cited in fn. 1, supra, which became effective July 1, 1987. It specifically provides that "Court Rules regarding third party practice and class action designations may not be applied" (emphasis added). Both the Board in its brief, and the petitioners in the reply made reference to rules no longer in existence.

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B. Is respondent liable for the award of interest?

Not unexpectedly, the main briefs of both parties discussed the decision of the Appellate Division in Board of Education of Newark v. Levitt, 197 N.J. Super. 239 (App. Div. 1984). That case, of course, settled in the affirmative the question of whether the Commissioner of Education, without express statutory or regulatory authority, could award interest on a judgment. Levitt held that postjudgment interest was "routinely allowed," and that the Commissioner had the ancillary power, pursuant to his general statutory authority, to include such relief in any appropriate order involving the payment of money. 197 N.J. Super. at 245-246. Indeed, in Levitt the Newark Board did not actually argue that postjudgment interest could not be awarded on a judgment against it; rather, it argued that pursuit of the right to such compensatory relief was limited to actions filed in court and not before the administrative agency. That notion was rejected.

Following the Levitt decision the State Board of Education, in May 1986, adopted a rule pertaining directly to the award of both pre- and postjudgment interest. Inexplicably, neither party has mentioned the rule in their latest briefs. Specifically, N.J.A.C. 6:24-1.18, provides as follows:

> (a) The commissioner pursuant to the criteria herein may award both pre-judgment and/or post-judgment interest in any circumstance in which a petitioner has sought such relief and has successfully established a claim to a monetary award.
>
> (b) "Interest" is defined as follows:
>
> 1. Pre-judgment interest is interest awarded for that period of time prior to the adjudication of the monetary claim.
>
> 2. Post-judgment interest is interest determined by the commissioner to be due to a petitioning party for that period of time after the claim has been successfully adjudicated but remains unsatisfied.
>
> (c) The following criteria shall be applied when awarding interest:
>
> 1. Pre-judgment interest shall be awarded by the commissioner when he or she has concluded that the denial of the monetary claim was an action taken in bad faith and/or has been determined to have been taken in deliberate violation of statute or rule.

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2. Post-judgment interest shall be awarded when a respondent has been determined through adjudication to be responsible for such payment, the precise amount of such claim has been established and the party responsible for the payment of the judgment has neither applied for nor obtained a stay of the decision but has failed to satisfy the claim within 60 days of its award.

(d) Rate of interest shall be awarded as follows:

1. Pre-judgment interest shall be awarded based upon the average rate of interest earned on investments by the party responsible for such payment during the period of time in which the monies awarded were illegally detained.

2. Post-judgment interest shall be awarded based upon the prevailing rate of interest established by court rules at the time that the right to the monetary claim was determined. (See New Jersey Court Rules, R. 4:42-11(a).)

Thus, given the Levitt decision in 1984 and the existence of N.J.A.C. 6:24-1.18 since 1986, I must consider the following questions: (1) Has there been an adjudication in relation to which interest can be ascertained; (2) If so, as of what date should interest begin to run, and should pre- and/or postjudgment interest be awarded; and (3) What is the appropriate rate of interest.

(1) The first determination required to be made in this context is whether there has been an "adjudication" in relation to which interest can be ascertained. The criteria set forth in N.J.A.C. 6:24-1.18(c) make reference to the fact that a determination against the party who must pay the interest must be made through an "adjudication" and, in connection with that adjudication, "the precise amount of such claim [must have] been established." Clearly, in this case, an "adjudication" of liability has been made.

(2) Nevertheless, the parties have distinctly varying points of view with respect to the nature and the date of the "judgment." According to petitioners, the time from which interest should begin to run dates back to the 1973 determination by the Commissioner in Yanowitz, since the right of the members of the petitioner class was adjudicated at that point and it was due to the Board's contumacious refusal to carry out its lawful obligations

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to honor it that they were forced to bring the instant action. In response, the Board maintains that the date of any judgment from which interest, if any, should run can be no earlier than March 3, 1987. According to the Board, it was on that date that an order was first entered against it for an amount that the Board conceded was due. The Board goes on to point out that, in fact, it then complied as quickly as possible with that order by depositing an anticipated additional amount needed to be paid to petitioners into the previously established trust fund, thereby demonstrating its good faith compliance in a timely fashion. The Board goes on to assert that ultimately no interest should be awarded since even though a judgment date of March 1987 arguably can be identified, a reasonable period of time, as noted by the Levitt court, then has to be allowed to arrange for the mechanics of payment and that under the circumstances of this case that process certainly was followed by it in good faith.

Although the Board did not argue that the date of the final consent judgment, February 17, 1988, should be the starting date, that is a position the Board might have taken. Thus, in anticipation of that argument, petitioners pointed out in their brief that to use that late date as the triggering time for the running of interest would be "entirely inequitable and unjust . . . [for] several reasons." See, Brief of Petitioners, p. 11. Specifically, petitioners maintain that the Board's conduct which precipitated the filing of these consolidated cases in 1979 was, by the Board's own admission, deliberately calculated to interfere with the rights of the members of the petitioning class to their lawful salary under the Yanowitz case, and it was because of that deliberate interference by the Board that it became necessary for suit to be started at all to enforce the admitted entitlement. Moreover, petitioners observe that this litigation has already consumed approximately nine years since the petitions were filed, and this circumstance is nothing less than "a monument to the Board's intentional refusal to shoulder its adjudicative burdens," and that such conduct, "directly caused all of the complexities inherent in this matter, none of which was necessary." See, Brief of Petitioners, p. 12.

Reference to the State Board rule to resolve this issue is appropriate. Subparagraph (a) provides that interest may be awarded under circumstances where a petitioner "has successfully established a claim to a monetary award." N.J.A.C. 6:24-1.18(a). As noted,

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subsection (c) states that the award of postjudgment interest shall be made when a respondent has been determined "through adjudication" to be responsible for such payment. N.J.A.C. 6:24-1.18(c)2. In my opinion, to use March 3, 1987, as the triggering date, no less February 17, 1988, would be entirely unfair and inappropriate given the background circumstances of this matter. As the Appellate Division pointed out in the Levitt case, interest on a money award which the Commissioner is authorized to grant is ". . . an essential and integral part of the award itself since the purpose of the fixed-sum award is to make the petitioner whole." Levitt at 245. In scanning the record in this case I believe that the critical date of "adjudication" with respect to these petitioners was March 16, 1981, the date of the Commissioner's decision adopting Judge Berman's initial decision of January 26, 1981. Until that point, it is at least arguable that petitioners, for whatever reason, may not have successfully been able to establish their claims to a monetary award as required by the rule. Whether interest should be allowed prior to that 1981 date is a question which will be addressed infra insofar as consideration of the "prejudgment" interest issue is concerned. Suffice it to say, at this point, that "adjudication" of the Board's liability took place on March 16, 1981, the date the Commissioner affirmed Judge Berman's initial decision. That the exact amount due and owing to each individual claimant could not be ascertained until recently is not, given the particular circumstances, a reason to interfere with the commencement of the running of interest as of 1981. To take that position would be further to reward the Board's delay and would redound unfairly to the detriment of class members, some of whom have waited since 1973 to receive their due compensation.

I am not unaware that the logistics involved in attempting to identify the precise claimants, the amount of their claims and the appropriate deductions, was inherently complex and that five or more years have gone by wherein the parties have been wrestling with those problems. Whether the lapse of time has been the "fault" of anyone is not particulary pertinent insofar as I am concerned. The critical fact is that the rightful owners of the funds did not have access to them through no fault of their own. Furthermore, the continuing complexity of the matter flows, in some part at least, from the fact that the Board did not act promptly following Yanowitz to identify other

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potential beneficiaries and to make the necessary back pay adjustments in each of their cases.

Accordingly, I believe that an award of "postjudgment" interest is proper in this case and pursuant to N.J.A.C. 6:24-1.18(c) should be deemed to have commenced on the 60th day following the date that the Commissioner affirmed the decision by Judge Berman in 1981; i.e., May 15, 1981.

(3) With respect to the calculation of the exact rate of the postjudgment interest, the State Board rule dictates that it shall be "based upon the prevailing rate of interest established by court rules at the time that the right to the monetary claim was determined. See, New Jersey Court Rules, R.4:42-11(a)." N.J.A.C. 6:24-1.18(d)2. Thus, the Court Rule will be applied to determine the interest rate, beginning May 15, 1981 and continuing thereafter.

Having identified the date of the judgment and the fact that postjudgment interest may be awarded, and having identified the rate of interest to apply in that respect, there are two remaining issues which touch upon the interest question. First, to what extent, if any, is prejudgment interest appropriate under the circumstances. Second, as a public body, should the Board be relieved in whole or in part of its obligation to pay interest.

Without question, where governmental entities such as boards of education are concerned, "particular circumspection in the granting of interest is required." See, e.g., Division of Youth and Family Services v. Middlesex County, 188 N.J. Super. 1 (App. Div. 1982); Fasolo v. Division of Pensions, 190 N.J. Super. 573 (App. Div. 1983); Emerick v. Teaneck Board of Education, 221 N.J. Super. 456 (App. Div. 1987). Those and other cases require the awarding entity to weigh in the balance the public interest that may be involved with respect to protection of the public fisc. I have taken pains to consider the matter with that principle in mind, and I am convinced that simply because respondent is a board of education is no reason to deny an award of interest to petitioners. The cited cases, and others, recognize that interest may be awarded even though the respondent is a public body. The State Board of Education, itself, by adoption of the cited rule, lends its

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imprimatur to that very notion. Indeed, the Commissioner has awarded interest against a board of education, including prejudgment interest. See, Maresca v. Board of Education of the Hudson County Area Vocational-Technical School District, Hudson County, OAL DKT. EDU 4099-86 (Jan. 7, 1987), Comm'r of Ed. (February 17, 1987). Indeed, in Maresca, the Commissioner awarded prejudgment interest because of the board's "bad faith" even though the administrative law judge had not done so.

Clearly, then, since interest can and has been awarded against the Board in this case, the remaining question is whether in addition to postjudgment interest under N.J.A.C. 6:24-1.18(c)2, an award of prejudgment interest should be made as well. The rule, of course, sets forth as the criterion for such an award the question of whether the Board's denial of the monetary claim "was an action taken in bad faith and/or has been determined to have been taken in deliberate violation of statute or rule." N.J.A.C. 6:24-1.18(c)1. In respect to the "bad faith" in this case, the petitioners vehemently insist that it clearly is present. The Board, of course, denies it. My review of the totality of the circumstances leads me to conclude, bearing in mind that a public body is involved and that particular circumspection is required in analyzing whether prejudgment interest should be awarded against such an entity (see Levitt at p. 248), that an award of prejudgment interest in this case is not appropriate. My review of the record indicates that the degree of the Board's conduct does not reach the level which can comfortably be described as "bad faith" in the context of the interest issue. While there have been deliberate delays, as Judge Berman found, I suggest that a very high threshold is required where the question of whether to award "bad faith" prejudgment interest involves a public body. I believe in this case that although the threshold was closely approached, it was not crossed. Thus, the interest award against the Board will be limited to the postjudgment period following May 15, 1981 as discussed above.

C. Shall counsel fees and costs be awarded against the Board?

The final consent judgment entered on February 17, 1988, made reference to the fact that a sum equal to 19.4 percent of the judgment (approximately $205,000) previously had been disbursed to counsel and to the accountants by way of fees and litigation costs.

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pursuant to court order and without objection. Petitioners maintain that the Board should reimburse the trust fund for this amount so that no member of the class entitled to receive any portion of the judgment should suffer a pro rata reduction.

The question of whether the Commissioner has the authority to award counsel fees was at one time a subject of some dispute. It has now essentially been settled. In the decision in E. B. v. Board of Education of the North Hunterdon Regional School District, OAL DKT. NO. EDU 5187-85 (March 1, 1986), Comm'r of Ed. (May 1, 1986) the recommendation of an administrative law judge to award counsel fees in the absence of specific statutory authority was rejected. In that matter the law judge noted that in addition to certain specific statutory provisions conferring upon the Commissioner the right to award counsel fees or to indemnify persons against the cost of litigation, there also had been occasions where the Commissioner awarded counsel fees even absent such statutory authority. See, Ross v. Jersey City Board of Education, 1981 S.L.D. 307. The administrative law judge in E. B. also cited as authority for the same proposition the decision of the Commissioner in Gibson v. Newark Board of Education, OAL DKT. EDU 4090-84 (Dec. 4, 1984), Comm'r of Ed. (Jan. 21, 1985). The administrative law judge's decision in E. B. predated, however, the State Board's reversal of Gibson, which rejected the right of the Commissioner to award counsel fees absent specific statutory authority. See, Gibson v. Newark Board of Education, State Board of Ed. Decision (May 9, 1986), aff'd per curiam N.J. App. Div., Oct. 15, 1986, A-5209-83T6 and A-3111-84T5 (unreported). In its reversal in Gibson, the State Board reviewed the law with respect to the award of counsel fees, particularly the decision of the Commissioner in Ross. It referred to Ross as "a serious deviation" and a "single exception to the consistent practice of denying attorneys fees."

Thus, in his decision in E. B., the Commissioner rejected the recommendation by the administrative law judge to award counsel fees, pointing out that he would continue to decline to do so unless he had statutory authority or the imprimatur of the courts.[4]

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[4]Interestingly, the Commissioner's decision in E. B. was a precursor as it preceded the State Board's decision in Gibson by about one week.

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Accordingly, even though the prohibition against OAL's entertaining class actions has been "superseded" on a one-time basis for purposes of these proceedings, I do not believe I should now go further with regard to the counsel fees and costs issue as well and ignore settled case law on that subject. Thus, the award to the petitioners shall be reduced, pro rata, by the previously ordered assessment of counsel fees and costs against the fund.

D. Are school nurses entitled to participate in the award?

During the course of the proceedings before me counsel realized that there was an additional group of employees who might be entitled to recovery as members of the petitioning class; namely, seven school nurses. This recognition arose when reference was made to the existence of N.J.S.A. 18A:29-4.2, effective July 1, 1972, which essentially requires school nurses to be treated as teaching staff members and to be paid according to the teachers salary guide. According to petitioners, although raised by the Board in its reply brief, there is no "statute of limitations" issue since the instant action was commenced during the 1978-79 school year and, therefore, the benchmark for determining commencement of the running of the statute would be September 1978 when school opened. Petitioners also suggest that there is no need for a hearing on this issue. They contend that even though there is no foundation in the record upon which a decision can be made with respect to the school nurses' eligibility, since the particular status of each must be matched against the four Yanowitz criteria identified by Judge Berman in his initial decision, this can be done administratively. If a legitimate dispute persists thereafter, a hearing can be held.

Having reviewed the respective positions of the parties concerning school nurses, I agree with petitioners that the "statute of limitations" claim is a "nonissue" and that no such bar stands in the way of the participation by the seven school nurses in the award if otherwise eligible. Furthermore, I see no need to schedule a hearing with respect to those employees since their precise status and entitlements can be ascertained administratively. Unlike the "pool substitutes" issue, no confusion surrounds the role of nurses vis-a-vis that of "regular teachers." Finally, I would further observe that the Board essentially appears

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to agree that a determination of eligibility involves nothing more than an administrative review. Again, if the need for a hearing does arise, this can be quickly scheduled since the undersigned has retained jurisdiction in order to act on subsequent filings in the nature of accountings.[5]

CONCLUSIONS OF LAW

In view of the foregoing, I **CONCLUDE** and **ORDER** that: (1) this action may continue as a "class action"; (2) postjudgment interest shall be awarded to all members of the petitioning class eligible to receive benefits, said interest to begin to run as of May 15, 1981, the 60th day following the date of the Commissioner's decision affirming the initial decision by Judge Berman; (3) prejudgment interest shall not be awarded; (4) counsel fees and costs already disbursed by court order on application need not be reimbursed to the trust fund by the Board; (5) the eligibility of school nurses to claim entitlement as members of the petitioning class is not barred by the statute of limitations and shall be determined administratively; and (6) jurisdiction is retained by OAL in order to entertain such subsequent applications for an accounting and other such matters as may be appropriate.

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[5]It is for this reason, incidentally, that this decision is designated as a "Partial Initial Decision." Otherwise, the entire file would have been transmitted to the Commissioner and jurisdiction relinquished. See, N.J.A.C. 1:1-18.1(h), 1:1-18.5.

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This recommended partial initial decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **SAUL COOPERMAN** for consideration.

April 5, 1988
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

APR 07 1988
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

APR 8 1988
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

amr/e

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EDWARD L. LOWICKI, BRUCE THOMAS and all others similarly situated,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	PARTIAL DECISION
RESPONDENT.	:	
	:	

The Commissioner has reviewed the record of this matter including the partial initial decision rendered by the Office of Administrative Law.

It is observed that both parties have filed exceptions to the partial initial decision with the Commissioner pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

Initially, the Commissioner observes that he is called upon to render a final determination with respect to the matter herein controverted:

1. May this matter proceed as a class action?

2. Is respondent liable for the award of interest (pre- or post-judgment)?

3. Shall counsel fees and costs be awarded against the respondent Board?

4. Are school nurses entitled to participate in the award of pre- or post-judgment interest?

The Commissioner incorporates by reference the chronology of events giving rise to the long-standing litigation in this matter as it is set forth in the partial initial decision, ante.

The exceptions of the parties to the partial initial decision shall be addressed in the order of the issues cited above.

I. May This Matter Proceed As A Class Action?

The Board excepts to the ALJ's discussion of the class action issue set forth in the partial initial decision, ante, insofar as it contends that this issue was not raised by the Board in order to evade any portion of liability for back pay against any current or future petitioner in this matter. In this regard the Board argues that:

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> The Board merely pointed out to the Court that the Board's indulgence of these claimants in the "class action" format, inasmuch as it is not allowed as a matter of right in this forum, as verified by the Court, should weigh in the Board's favor as evidence of the Board's good faith and against the assessment of interest.
> (Board's Exceptions, at p. 5)

In their brief which accompanies their exceptions, petitioners reject the Board's explanation of its objections to a class action format as being nothing more than an act of bad faith and an exercise in futility to raise this issue at this time. Petitioners maintain that the record of this matter clearly indicates that the Board never raised or pursued this issue at any level of these administrative proceedings before the Commissioner or the State Board of Education since these individual cases were consolidated by the late ALJ Jack Berman and then deemed to be a class action proceeding. (See Commissioner's Decision dated March 16, 1981, aff'd with clarification State Board May 5, 1982.)

The Commissioner has reviewed the respective positions taken by the parties with respect to the class action issue and determines that the Board's exceptions are without merit for precisely those reasons set forth in the partial initial decision, ante.

II. Is Respondent Liable For The Award Of Interest (Pre- Or Post-Judgment)?

The Board rejects that finding of the ALJ which holds it liable for post-judgment interest payable to the class of petitioners herein commencing sixty days "following the date that the Commissioner affirmed the [partial initial] decision by Judge Berman in 1981; i.e., May 15, 1981." (Partial Initial Decision, ante) The Commissioner has reviewed the Board's exceptions (First, Second and Third Exceptions, at pp. 2-8) setting forth its reasons why it objects to the ALJ's findings and conclusions regarding the payment of post-judgment interest or, in the alternative, giving its reasons why this matter should be remanded to the ALJ for further hearing on the issue of precisely when post-judgment interest should accrue. The Board also argues in the alternative that in the event that it is liable for post-judgment interest herein, it may only accrue to December 1982 by virtue of the fact that it promptly complied with the order of the ALJ in December 1982 to make the first deposit of $338,000 to the "Jersey City Teachers Back Pay Fund" to settle petitioners' claims in this matter. The Board further maintains that it subsequently made the following timely deposits to the fund as ordered by the ALJ: March 11, 1987 ($80,000); June 17, 1987 ($10,917.54); June 23, 1987 ($255,000); November 20, 1987 ($216,332.39) and December 23, 1987 ($8,880).

In this regard, the Board maintains in pertinent part that its liability for the payment of post-judgment interest may not continue beyond the date of December 1982 when it promptly deposited its first payment for that purpose as ordered by the ALJ.

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Petitioners also except to the ALJ's determination with respect to the date upon which pre- or post-judgment interest should be awarded to them. In support of their contention, petitioners' exceptions read in pertinent part:

> ***While we recognize that the School Board is a public agency, we also submit that neither a private party nor a public agency should be entitled to benefit from its own wrong, and public employees are no more amendable to being cheated than those in the private sector. Here, the School Board admitted under oath not only that it was wrong, but that it was intentionally wrong in suspending Yanowitz payments, and further intentionally wrong in providing incorrect information to claimants. By doing this, the Board gained valuable time between 1973 (when Yanowitz was finally determined) and 1981 when this case, commenced in 1979, was determined as to Enforcement by Judge Berman. (emphasis in text) (Petitioners' Exceptions, at p. 4)
>
> ***
>
> Judge Weiss considered the period between 1973 and 1981 to be a "pre-judgment" period, (i.e., before the Enforcement Phase Judge in this case). However, [he] denied pre-judgment interest for that period. We submit that the proper characterization for that period is "post-judgment" with reference to the Yanowitz Judgment, not the judgment in the Enforcement Phase of this case.
>
> Even if Judge Weiss's dichotomy between pre- and post-judgment interest were accepted, we respectfully submit that pre-judgment interest between 1973 and 1981 should be awarded to the claimants. Our basis for this conclusion is the bad faith of the Board in secretly closing down the Yanowitz claims payment mechanism, a fact which has been admitted by the Board and has never been in dispute in this case. Judge Weiss, at page 12 of his opinion, reached the subjective conclusion that "the record indicates that the degree of the Board's conduct does not reach the level which can comfortably be described as 'bad faith' in the context of the interest issue." Judge Weiss held that deliberate delays did exist. Indeed they were found by Judge Berman. But Judge Weiss applied a "very high threshold" in determining whether to award pre-judgment interest for bad faith against a public body. As he said, "I believe in this case that although the threshold was closely approached, it was not

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> crossed. Thus the interest award against the Board will be limited to the postjudgment period following May 15, 1981 as [discussed] above." At page 12.
>
> We respectfully submit that regardless of the status of the Board as a public body, what was done was reprehensible because it was knowingly illegal and in contempt of the Yanowitz Final Judgment. More importantly, the Board's continued illegal course of conduct denied proper salary payments to scores of its teachers as part of a wholesale pattern and practice knowingly violative of the specifically declared law of the State of New Jersey as announced in the Yanowitz decision. Just as importantly, unless interest is allowed for the entire period following Yanowitz the affected teachers cannot hope to be placed in status quo ante. For many of them, the bar of the statute of limitation already allows to the Board substantial grace to which it would not otherwise be entitled. This should be enough in the nature of consideration of the Board as a public body. (Petitioners' Exceptions, at pp. 6-7)

The Commissioner has reviewed the respective positions of the parties in excepting to the ALJ's findings and conclusions pertaining to the denial of pre-judgment interest and the award of post-judgment interest commencing as of May 15, 1981.

In this regard, the Commissioner affirms and adopts as his own those specific findings and conclusions set forth by the ALJ in detail in the partial initial decision, ante, which hold in pertinent part as follows:

> Reference to the State Board rule to resolve this issue is appropriate. Subparagraph (a) provides that interest may be awarded under circumstances where a petitioner "has successfully established a claim to a monetary award." N.J.A.C. 6:24-1.18(a). As noted, subsection (c) states that the award of postjudgment interest shall be made when a respondent has been determined "through adjudication" to be responsible for such payment. N.J.A.C. 6:24-1.18(c)2. In my opinion, to use March 3, 1987, as the triggering date, no less February 17, 1988, would be entirely unfair and inappropriate given the background circumstances of this matter. As the Appellate Division pointed out in the Levitt case, interest on a money award which the Commissioner is authorized to grant is "...an essential and integral part of the award itself since the purpose of the fixed-sum award is to make the petitioner whole." Levitt at 245. In scanning

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the record in this case I believe that the critical date of "adjudication" with respect to these petitioners was March 16, 1981, the date of the Commissioner's decision adopting Judge Berman's initial decision of January 26, 1981. Until that point, it is at least arguable that petitioners, for whatever reason, may not have successfully been able to establish their claims to a monetary award as required by the rule. Whether interest should be allowed prior to that 1981 date is a question which will be addressed infra insofar as consideration of the "prejudgment" interest issue is concerned. Suffice it to say, at this point, that "adjudication" of the Board's liability took place on March 16, 1981, the date the Commissioner affirmed Judge Berman's initial decision. That the exact amount due and owing to each individual claimant could not be ascertained until recently is not, given the particular circumstances, a reason to interfere with the commencement of the running of interest as of 1981. To take that position would be further to reward the Board's delay and would redound unfairly to the detriment of class members, some of whom have waited since 1973 to receive their due compensation.

I am not unaware that the logistics involved in attempting to identify the precise claimants, the amount of their claims and the appropriate deductions, was inherently complex and that five or more years have gone by wherein the parties have been wrestling with those problems. Whether the lapse of time has been the "fault" of anyone is not particularly pertinent insofar as I am concerned. The critical fact is that the rightful owners of the funds did not have access to them through no fault of their own. Furthermore, the continuing complexity of the matter flows, in some part at least, from the fact that the Board did not act promptly following Yanowitz to identify other potential beneficiaries and to make the necessary back pay adjustments in each of their cases.

Accordingly, I believe that an award of "postjudgment" interest is proper in this case and pursuant to N.J.A.C. 6;24-1.18(c) should be deemed to have commenced on the 60th day following the date that the Commissioner affirmed the decision by Judge Berman in 1981; i.e., May 15, 1981.

***

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> Clearly, then, since interest can and has been awarded against the Board in this case, the remaining question is whether in addition to postjudgment interest under N.J.A.C. 6:24-1.18(c)2, an award of prejudgment interest should be made as well. The rule, of course, sets forth as the criterion for such an award the question of whether the Board's denial of the monetary claim "was an action taken in bad faith and/or has been determined to have been taken in deliberate violation of statute or rule." N.J.A.C. 6:24-1.18(c)1. In respect to the "bad faith" in this case, the petitioners vehemently insist that it clearly is present. The Board, of course, denies it. My review of the totality of the circumstances leads me to conclude, bearing in mind that a public body is involved and that particular circumspection is required in analyzing whether prejudgment interest should be awarded against such an entity (see Levitt at p. 248), that an award of prejudgment interest in this case is not appropriate. My review of the record indicates that the degree of the Board's conduct does not reach the level which can comfortably be described as "bad faith" in the context of the interest issue. While there have been deliberate delays, as Judge Berman found, I suggest that a very high threshold is required where the question of whether to award "bad faith" prejudgment interest involves a public body. I believe in this case that although the threshold was closely approached, it was not crossed. Thus, the interest award against the Board will be limited to the postjudgment period following May 15, 1981 as discussed above.
>
> (Partial Initial Decision, ante)

Accordingly, the Commissioner finds and determines that the Board is liable for the payment of post-judgment interest to be awarded to petitioners and calculated as of May 15, 1981.

III. Shall Counsel Fees And Costs Be Awarded Against the Board?

The Commissioner has reviewed the respective positions of the parties taken in their exceptions pertaining to any further award of counsel fees and costs by the Board to petitioners. It is noted that an amount of $205,000 of the amount set aside in the Teachers Back Pay Fund had been previously disbursed to counsel and to the accountants by way of fees and litigation costs pursuant to court order without objection by the Board. However, the Commissioner determines that the ALJ has properly found and concluded in these proceedings that any further award of counsel's fees and costs pertaining to these proceedings will not be entertained by the Commissioner. This determination is grounded

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upon the State Board's decision reversing the Commissioner's prior decision in Gibson and denying the award of counsel fees.

However, the Commissioner finds and determines that the prior award of counsel fees in the amount of $205,000 by an earlier order of the ALJ should not have been effectuated without first having sought prior approval by the Commissioner. In this regard, the Commissioner finds that the ALJ's determination to award counsel fees in the above-stated amount at petitioners' request was premature and procedurally defective insofar as there was no authorization for the payments of such funds granted by the Commissioner.

Notwithstanding the above finding, the Commissioner concurs with the ALJ's finding and conclusion that the amount of $205,000 which was previously awarded by an order of the ALJ without objection from the Teachers Back Pay Fund will be sustained and reduced on a pro rata basis from the amounts to be awarded each petitioner against the Teachers Back Pay Fund.

IV. Are School Nurses Entitled To Participate In The Award Of Pre- And Post-Judgment Interest?

The Commissioner observes that while the parties have entered no objection to the belated inclusion of seven school nurses as eligible participants to these proceedings pursuant to N.J.S.A. 18A:29-4.2, as well as N.J.S.A. 18A:1-1, their identification as part of the class of petitioners may not be entertained by virtue of the State Board's decision of May 5, 1982, which affirmed with modification the Commissioner's earlier decision of March 16, 1981.

In its decision, the State Board held the following:

> We would affirm the foregoing rulings, but add one more. As we have frequently held, most recently in the military service credit case (see, for example, Mezichraiky v. Newark Board of Education, 1981 S.L.D. _____), in each school year that a petitioner was employed on terms which violated the law as laid down in Yanowitz, a new cause of action arose in favor of petitioner. Therefore, the statute bars only those claims which matured more than six years before a petition has been or will be filed on behalf of that petitioner, either individually or in a proper class action. In other words, the excepted class described in subparagraph 2 above can validly claim any salary differentials or other benefits which were illegally denied by the Board for the six years next preceding the filing of the petition; and, as the Commissioner has determined, the defenses of laches, waiver and estoppel will not avail respondent under the circumstances of this case.
>
> (Slip Opinion, at p. 2)

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Accordingly, pursuant to the above-cited decisions of the Commissioner and the State Board, the class of petitioners which was recognized as of May 5, 1982, the date of the State Board decision, may not now be expanded. Moreover, given the prospective prohibition with regard to class action proceedings before the Commissioner (Lukas and N.J.A.C. 1:1-1.3(a)), the applications of the seven school nurses will be recognized conditioned upon their filing a Petition of Appeal setting forth their specific prayers for relief before the Commissioner. In the event that such application is made, it will be considered pursuant to the above-cited ruling pertaining to the six year statute of limitations enunciated by the State Board on May 5, 1982.

In view of the foregoing, the Commissioner finds and determines that:

1. This action may continue as a class action, except for those seven school nurses excluded from these proceedings for the reasons set forth above;

2. Post-judgment interest shall be awarded to all members of the petitioning class eligible to receive benefits, said interest to begin to run as of May 15, 1981, the 60th day following the date of the Commissioner's decision affirming the initial decision of Judge Berman;

3. Pre-judgment interest shall not be awarded;

4. Counsel fees and costs already disbursed by court order on application to the ALJ shall not be reimbursed to the trust fund by the Board.

Accordingly, the Commissioner adopts as his own the findings and conclusions of the ALJ in the partial initial decision as modified above.

This matter is remanded to the Office of Administrative Law for the purpose of finalizing any other administrative matters pertaining to these proceedings deemed appropriate by the ALJ.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

June 6, 1988

Pending State Board

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2597-88
AGENCY DKT. NO. 57-4/88

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION FOR THE SCHOOL DISTRICT OF STRATFORD, CAMDEN COUNTY

Earl R. Milnor, pro se

Alan R. Schmoll, Esq., Board Attorney, for the Stratford School Board (Capehart & Scatchard, attorneys)

Record Closed: April 20, 1988 Decided: April 22, 1988

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

This matter involves a challenge to the results of a referendum approved at a school board election held in Stratford, Camden County, on April 5, 1988. As a result of the vote, the referendum was approved by a vote of 679 to 670. A recount of the voting tally has been requested and is scheduled to be held in the County Clerk's Office on April 25, 1988.

On April 10, 1988, Earl R. Milnor, a registered voter in Stratford, signed a letter (hereinafter referred to as the "petition") which was forwarded to the Commissioner of Education requesting a review of the results of the election held on April 5. Attached to the letter was a list of signatures of registered voters who joined in Mr. Milnor's request. The matter was then transferred to the Office of Administrative Law for a hearing. A hearing was held in the Stratford Municipal Court on April 19, 1988. Following presentation of the challenges to the results of the election as presented by the

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objectors (hereinafter referred to as "petitioners"), the Board attorney moved to dismiss the matter for failure of the petitioners to present sufficient evidence from which a reasonable finder of fact could determine that there was any legal basis for overturning the results of the election. The motion was taken under advisement, as was the issue of whether the Commissioner of Education had jurisdiction to determine certain issues raised by the petitioners concerning the use of absentee ballots.

ISSUES

The petition from Mr. Milnor and the challenging voters notes six issues which the voters contend were actions and/or omissions which constitute the basis for their concern. They are:

1. No check of voter registration books were made against the names and identifications of voters who had received absentee ballots.

2. In many cases, no check of voter registration books were made prior to allowing voters to sign poll lists and tally sheets and have access to voting machines.

3. Unofficial information indicates that most, if not all, absentee ballots were obtained from the county clerk by one individual.

4. Public solicitation of "Yes" votes on the bond referendum were conducted in and about the polling place.

5. After the polling place was closed, an additional number of absentee ballots were entered.

6. Prior to the most recent election, a concerted campaign urging a "Yes" vote on the bond referendum was conducted. This included a phone campaign, selective literature to targeted voter groups, posters and signs, none of which bore identification of the authors or their funding.

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CONCLUSION

Based upon the evidence presented by the petitioners, and giving that evidence the benefit of all reasonable inferences arisng therefrom, as is required by the standard for determining whether the matter must proceed further, I **FIND** that the evidence is sufficient to establish that a prima facie case exists of certain irregularities in the conduct of election officials and in the conduct of the election campaign. However, despite the existence of evidence of such irregularities, I **CONCLUDE** that, in accordance with applicable standards for determining the validity of elections, that no reasonable finder of fact could determine based upon the irregularities established that the will of the citizens has been thwarted or that there has been any evidence to indicate that the election results were tainted such as to require that the results be voided and a new election ordered. Therefore, with respect to those matters which are within the jurisdiction of the Commissioner of Education, I **CONCLUDE** that the objectors have failed to establish a sufficient case to require that the matter proceed further. With respect to the question of jurisdiction over issues involving absentee ballots, I **CONCLUDE** that the Commissioner of Education has long held that he does not possess such jurisdiction and therefore any challenges to the absentee ballot process must be undertaken in the Superior Court. Finally, in connection with the results of the election, I **CONCLUDE** that there is nothing in the present proceeding which would change the results of the election; however, the final certification of the results of the election must abide the recount presently scheduled for April 25, as well as any proceedings which may occur in Superior Court.

The explanation of the evidence which was presented at the hearing and the reasoning behind the conclusions set forth above is explained in detail below.

EVIDENCE

As noted above, the only evidence presented in the hearing was that which was put forth by the petitioners. This decision is of course based solely on that evidence and in accordance with the legal standard applicable for a motion at the end of the petitioner's case. It is first appropriate to note that having considered the testimony of the various citizens who testified, I found each and every one of them to be sincere, concerned, and quite believable in their presentations. I have no doubt whatsoever that the situations which they described in connection with their experiences during the

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election did in fact occur as described. While the School Board was not called upon to put forth evidence at this point in the proceedings, it does not seem likely that any evidence which the Board might produce would affect the credibility of the testimony of the various witnesses already presented, although conceivably the Board's evidence might flesh out the situation and point out circumstances which the testifying voters might not have observed. This will be explained below.

With respect to the first issue raised in the petition, concerning an alleged failure to check voter registration books, Paul H. Roedig, Frances W. Young, Jr., Salvatore T. Mansi, Gerard McManus, Eve Brown and Eugene Moore each testified that they were registered voters who presented themselves to vote on April 5 at Yellin School, which was the only polling place. Each voter came up to the table where the election officials were located and presented themselves to initiate the process which would permit them to enter the polling booth and cast their ballot. In each case, when they came to the table they were asked to sign a legal pad and two slips of paper, which papers were then handed to the election officials located at each of two polling booths, one of which was for the local Stratford School District, and the other of which was for the regional high school district which was also holding an election. In the case of each witness, they testified without equivocation that no election official to whom they presented themselves at that table made any effort to check their names in the voter registration books or to compare the signature which they placed on any of the papers which they were presented, the pad and/or the slips, against their signature in the voting registration book. Several of the witnesses acknowledged that the voting official sitting at the table knew them. Others indicated that they did not know the official. Several of the witnesses were accompanied by their spouses at the time they presented themselves and in the case of the spouses again no check of the registration book was made by the election official. The individuals were given the voting slips and permitted to proceed to cast their ballots without any obvious check of the registration books having been made. Several of the witnesses acknowledge that after they left the registration table and proceeded to the polling booth they did not observe what was happening at the table. However, Eve Brown, who found the fact that no check of the registration book was made to be quite surprising, testified that she kept her eye on the table as she went up to the polling booth and did not observe any check being made in the book. She noted that other election officials at other stations at the table, presumably for other districts, were apparently checking registration books. When Ms. Brown asked the lady at the table for her district why she did not check the registration book, the lady responded "I know my

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district." Brown then aked what would prevent her from bringing her mother in from Voorhees Township to vote and again the lady responded that she knew her district.

Issue 4 of the April 10, 1988 petition concerns alleged public solicitation of "yes" votes in and about the polling place. The testimony on this issue was received from Frances W. Young, Jr., Eugene W. Moore, Earl Milnor, Paul Roedig and Salvatore Mansi, and by affidavit, from Vincent and Josephine Insalaco. Each of these individuals explained that on the day of the election they went to the Yellin School and while parking their automobiles they were approached by elementary school age children who told them to vote "yes" on the referendum and who followed them as they proceeded to the school yelling at them to vote yes. Mr. Moore noted that several of the children had balloons with the word "yes" on them and that he was told by some of the students that he should vote yes because they needed an education. None of the individuals made any complaint concerning this activity to any election official. However, Mr. Moore's mother said something to the election official at the table and the lady said "what are you going to do, they're here with their parents." There was also testimony that a number of children were inside the polling area, although these children were not identified as having made any statements there concerning how the voters should vote.

In addition to the children's activities, several of the witnesses noted that Board Secretary Deserable, Superintendent of Schools Gene Iannette, and James P. Dailey, Principle of the Park View School, were seen at various times inside the polling area. None of the witnesses testified that any of these individuals had solicited their votes or had made any comment to them on how they should vote. However, several of the witnesses felt that their presence within the polling area was improper or perhaps illegal and that only election officials and voters were permitted in the area. A photograph showing Mr. Deserable standing between two voting booths was introduced in evidence and testimony was also presented concerning his appearance within the polling area. Both Mr. Iannette and Mr. Dailey testified as witnesses called by the petitioners and they each acknowledged that they were present within the polling area at various times for limited amounts of time during the period when the polls were still open between 6:00 p.m. and 9:00 p.m. when the polls closed. Iannette explained that he had passed through the polling area several times going from one area of the school to another while conducting other school business and also noted that he had met a school board member in the voting area and had a short conversation with that individual for perhaps five to eight minutes. Mr. Dailey also acknowledged his presence and occasional pasage

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through the voting area. Each man denied any solication of votes or any conversations concerning voting with any voters. Mr. Dailey explained that he did have a conversation with two voters concerning a school teacher in his school who was ill.

Item 6 on the petition deals with the election campaign and more specifically with certain posters and signs which were evident within the community prior to the election. Examples of these were introduced in evidence. P-4 is a cardboard sign which states "April 5 VOTE YES QUESTION 3." There are no other words on the sign. In addition, a photograph of a sign which was located near the intersection of Vasser Avenue and Atlantic Avenue was also introduced. This 4 x 4 foot sign contained the words VOTE YES QUESTION 3 with an arrow pointing to the word "VOTE." Again, there is no other printing on the sign. The photograph shows the sign after it had been tampered with by placing the words "THANK YOU" over the original sign. Mr. Mansi testified that the posters such as P-4 were observed by him on several polls and trees in his neighborhood, one on the property of a school board member who lived across the street from him, one on another neighbors property, and at least one on the corner of Warwick and Vasser adjacent to a school. He never made any complaint about the signs prior to the election.

The objection to the signs arises from their failure to contain certain required references concerning the printer and the person paying the cost of the sign. It is quite obvious that the posters and signs do not contain such language.

In addition to the above evidence, there was also evidence presented from several witnesses concerning telephone calls received prior to and on the day of the election. These matters were referred to as a "phone campaign" in the petition under item 6. During the hearing, there was no clear presentation by the challenger of what legal improprieties might have been involved in the telephone campaign, although it is clear from the testimony that the callers did not identify themselves as representing any particular group.

On cross-examination of each of the voters who testified, counsel for the Board queried as to whether their minds concerning the election had been swayed by the signs, posters, children's solicitations, or other complained of matters. Each vigorously asserted that they had not been swayed by these items.

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FINDINGS AND LEGAL ANALYSIS

JURISDICTION OVER ABSENTEE BALLOTS

Items 1, 3 and 5 of the petition reference purported problems concerning absentee ballots. Item 1 questions whether a check was made of the names and identification of voters who presented themselves at the polling place to see whether they had received absentee ballots. In some sense this challenge does not go directly to the absentee ballots themselves, but to the procedures used at the polling place. I have considered below evidence concerning the action of the election officials at the polling place. However, with respect to any questions concerning the propriety of the procedures involved with the absentee ballots, the Commissioner of Education has regularly held that he does not have jurisdiction to deal with any questions concerning absentee ballots. The procedures governing absentee ballots are set forth in Title 19 of the New Jersey statutes. They provide for the conduct by the County Clerk and certification of the results of the absentee balloting. The Commissioner has declined to become involved in determining the validity of such ballots or of the count thereof. Borough of Rutherford, 1974 S.L.D. 381. Therefore, the petition items with respect to absentee ballots will not be reviewed in this decision and must be presented in other proceedings before the appropriate forum.

ITEMS 2, 4 AND 6

Following presentation of the petitioners' case, the Board moved to dismiss the matter. Such a motion is appropriately made where the evidence presented, when given the benefit of all reasonable inferences arising therefrom, would not permit a reasonable judge to conclude that the relief sought by the party opposing the motion could be granted. Here, in more direct terms, the question is whether, giving all reasonable inferences to the proofs presented by the petitioners, a reasonable judge could determine that there was any legal basis upon which the election results could be affected. Dolson v. Anastasia, 55 N.J. 2 (1969).

Based upon the evidence which has been presented by the petitioners, I **FIND** that, for the purposes of this motion, they have established a prima facie case that the election officials for District 1 did not check names and signatures in the voter registration books against the names and identifications of voters written on the legal pad or on the tally sheets nor does it appear that any check of individuals presenting

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themselves as registered voters was made to determine whether they were listed on any list of those receiving absentee ballots. In addition, the prima facie evidence establishes that certain elementary school children did solicit yes votes from voters in the parking lot of the school in which the polling was held and from the description of the physical layout it appears that some of the solicitation may well have occurred within 100 feet of the polling place. Finally, the evidence concerning the posters and sign establish that these did not contain any reference to the person who printed the signs or who paid for them.

N.J.S.A. 18A:14-50 requires that:

> The voter shall, prior to the receipt of an official ballot, sign his name without assistance and state his address in an appropriate column of the poll list and the election officer in charge of the poll list shall record therein opposite the voter's name, the number of the official ballot furnished to the voter for voting.

N.J.S.A. 18A:14-51 provides that:

> After the voter shall have so signed and before an official ballot should be given to him, one of the election officers shall compare the signature made in the poll list with the signature theretofore made by the voter in the signature copy register, and if the signature thus written in the poll list is the same or sufficiently similar to the signature copy register, the voter shall be able to receive a ballot.

N.J.S.A. 18A:14-72 provides that:

> If a person shall on any day fixed for any election tamper, deface or interfere with any polling booth or obstruct the entrance to any polling place, or obstruct or interfere with any voter, or loiter, or do any electioneering within any polling place or within 100 feet thereof, he shall be a disorderly person and shall be punished by a fine not exceeding $500 or by imprisonment not exceeding one year, or both.

N.J.A.C. 18A:14-97 provides that:

> No person shall print, copy, publish, exhibit, distribute or pay for printing, copying, publishing, exhibiting or distribution or cause to be distributed in any manner or by any means, any circular, handbill, card, pamphlet, statement, advertisement or other printed matter having reference to any election or to any

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> candidate or to the adoption or rejection of any public question at any annual or special school election unless such circular, handbill, card, pamphlet, statement, advertisement or other printed matter shall bear upon its face a statement of the name and address of the person or persons causing the same to be printed, copied or published or of the name and address of a person or persons by whom the cost of the printing, copying, or publishing thereof has been or is to be defrayed and of the name and address of the person or persons by whom the same is printed, copied or published.

Based upon the evidence presented, and for purposes of determining this motion, I **CONCLUDE** that no check of voter registration books was made against the signatures placed on the legal pad or the tally sheets by the election officials to whom the witnesses presented themselves at the time of the election and I **FIND** for the purposes of this motion that such action on the part of the election officials was improper and violative of the above-cited section 51. In addition, I **CONCLUDE** that some evidence does exist of public solicitation, albeit by elementary school age children, within 100 feet of the polling place. Finally, I **CONCLUDE** that certain campaign posters and signs were displayed without them containing the statements and information required by section 97. As to each of the above, I **CONCLUDE** that the evidence presented does establish those violations for the purposes of this motion.

With respect to the telephone calls, I **FIND** no evidence that these violated any regulations or statutory commands with respect to the conduct of elections. Section 97, cited above, refers to printed matter. There is no requirement that telephone callers identify who they are calling on behalf of, who they are, or for that matter, who may be paying the cost of the telephone calls. While the calls may have been obnoxious, annoying, or otherwise disturbing, they did not violate any law.

The rule in this state concerning the voiding of elections has been stated most clearly in the decision of In re Wene, 26 N.J. Super. 363 (Law. Div. 1953), aff'd, Were v. Meyner, 13 N.J. 185 (1953).

> The rule in our State is firmly established that if any irregularity or any other deviation from the election law by the election officials is to be adjudged to have the effect of invalidating a vote or an election, where the statute does not so expressly provide, there must be a connection between such irregularity and the result of the election; that is, the irregularity must be the producing cause of illegal votes which would not have been cast or of defeating legal votes which would have been counted, had the

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> irregularity not taken place, and to an extent to challenge or change the result of the election; or it must be shown that the irregularity in some other way influenced the election so as to have repressed a full and free expression of the popular will. (26 N.J. Super. at 383.)

Even in instances of gross irregularities, where no fraud is established, election results will not be overturned. Love v. Bd. of Chosen Freeholders, 35 N.J.L. 269 (Supp. Ct. 1871); Stone v. Wyckoff, 102 N.J. Super. 26 (App. Div. 1968). These rules, which have been stated in the context of regular elections, have also been applied by the Commissioner of Education in the context of education elections and the above-cited language from the Wene case has been regularly used by the Commissioner in establishing the standard applicable for determining when school election results may be affected. South River, 1974 S.L.D. 1040, 1048.

More specifically, the Commissioner has dealt with the specific types of irregularities asserted in this proceeding and has applied the same general rule as to the sanctity of election results in connection with these types of violations. For instance, in Greater Egg Harbor Reg. Sch. Dist., 1978 S.L.D. 11, the Commissioner dealt with allegations of literature which had been distributed without bearing the required identifications of the printer and the persons paying for the printing. While the hearing examiner determined that in fact the precise provisions of N.J.S.A. 18A:14-97 had not been followed he held "there is no evidence in the record to establish that the distribution of the flyer thwarted the will of the people." In deciding the case, the Commissioner, ruling on the hearing examiner's findings, concluded that the Wene standard applied and that while several of the election laws had been violated, the

> violations, however, either individually or collectively do not establish that the announced successful candidates would be other than those declared. It is the clear intent of the law that elections are to be given effect whenever possible. It is well established that gross irregularities, when not amounting to fraud, do not vitiate an election. . . . It is only when the deviations from statutory procedure are so gross as to produce illegal votes which would not have been cast or to defeat legal votes which would have been counted, so as to make impossible a determination of the will of the people, that an election will be set aside. (In re Wene, 26 N.J. Super. 636 (Law Div. 1953).)

In Borough of Woodlynne, 1978 S.L.D. 357, the hearing examiner concluded that the petitioners had established that there was a failure to check signatures against

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the signature copy register. He concluded that four persons cast ballots who were not entitled to vote. However, the examiner concluded that there was "no proof that the will of the electorate had been thwarted" pointing out that even if the four illegal ballots were eliminated they would not affect the outcome of the election. The Commissioner reviewed the examiner's findings and adopted them. He did not overturn the results of the election, merely directing that the Board of Education henceforth comply with the provisions of the election laws and recommending that the illegal voters be referred to the County Prosecutor for possible action.

From the above, it is quite clear that the mere establishment of irregularities in the voting process or in the campaign do not in and of themselves automatically allow for the voiding of election results. In the present case, giving credit to the allegations set forth by the petitioners in their proofs, I **CONCLUDE** that no reasonable judge, applying the standards established by the courts of this state and adopted by the Commissioner of Education, could determine that there is any evidence whatsoever that the will of the people was thwarted in connection with the referendum election. The petitioners have failed to establish any evidence whatsoever that there was any illegal voting, that any legal voter was denied the right to vote, that any voter was threatened, swayed or improperly influenced by the actions of the children in the school parking lot, or that the improperly formulated sign or posters did anything to affect the vote of any individual. Under such circumstances, I **CONCLUDE** that the petitioners have failed to establish a prima facie case of any legal basis for overturning the results of the election. Therefore, I **CONCLUDE** that with respect to the challenges set forth in the petition in items 1, 2, 4 and 6, the challenges must be dismissed. Any action with respect to the validity of absentee ballots must be challenged before the County Clerk and in the Superior Court. The results of the election will therefore stand, subject to such other action as may be taken and the recount by the County Clerk.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

April 22, 1988
DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

April 25, 1988
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

APR 27 1988
DATE

OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH OF	:	DECISION
STRATFORD, CAMDEN COUNTY.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

Upon his careful and independent review of the record of this matter, the Commissioner concurs with the findings and the conclusion of the Office of Administrative Law that petitioners herein have failed to establish a prima facie case of any legal basis for overturning the results of the election in the Stratford School District. Therefore, the challenges set forth in the petition in items 1, 2, 4, and 6, not dealing with absentee ballots, are hereby dismissed. It is noted that the record indicates petitioners applied for a recount of the absentee ballots and a review of the application for absentee ballots with poll lists in a letter to the Honorable Judge DeMartino of the Superior Court of New Jersey in Camden, dated May 7, 1988. As of the date of this decision, however, there has been no information provided by petitioners regarding said recount.

Consequently, the Commissioner's decision is considered solely upon those findings of fact and conclusions of law as set forth in the initial decision. In the event that a recount of absentee ballots is conducted by virtue of an order of the court, this decision may be modified as the court deems appropriate or as may be required by the result of such recount. In the absence of any such circumstances, the results of the election will stand.

The Commissioner notes for the record that in his decision dated May 11, 1988, the Commissioner determined that the bond referendum proposal submitted to the electorate at the annual school election held in the School District of the Borough of Stratford on April 5, 1988 gained voter approval.

Accordingly, Issues 1, 2, 4, and 6 not dealing with absentee ballots are dismissed with prejudice.

COMMISSIONER OF EDUCATION

June 6, 1988

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IN THE MATTER OF THE NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION, THIRD REALIGNMENT OF LEAGUES AND CONFERENCES.	:	COMMISSIONER OF EDUCATION DECISION

For the Petitioner Immaculata High School, Robert J. Foley, Esq.

For the Petitioner St. Patrick's High School, Obermayer, Rebmann, Maxwell & Hippel (Philip M. Colicchio, Esq., of Counsel)

For the Petitioner Newark Board, Schwartz, Pisano, Simon & Edelstein (Lawrence Schwartz, Stephen Edelstein and Nicholas Celso, Esqs.)

For the Respondent NJSIAA, Sterns, Herbert, Weinroth & Petrino (Michael J. Herbert, Esq., of Counsel)

This matter was opened before the Commissioner by way of appeal from the final determination of the Executive Committee of the New Jersey State Interscholastic Athletic Association (NJSIAA) upholding, with slight modification, the recommendation of the Special Committee on Leagues and Conferences regarding applications for membership in the various athletic leagues and conferences within the State of New Jersey. The matter controverted herein is an outgrowth of the exception taken to the aforesaid action by the Board of Education of the City of Newark, and the private parochial schools of Immaculata, located in Somerville, and St. Patrick's High School, located in Elizabeth.

BACKGROUND TO THE DISPUTE

In 1979 an appeal was filed by two urban schools charging unequal opportunity to compete athletically with schools of comparable size and strength and, thus, denial of opportunity to compete in post-season championship play. (See In the Matter of Passaic Board of Education, Seymour Puckowitz, Superintendent of Schools and Frank Verducci, Coach of Barringer High School v. New Jersey State Interscholastic Athletic Association, decided November 16, 1979.) Although the petitions were dismissed, the Commissioner directed the NJSIAA to conduct an inquiry to determine whether inequities existed in the scheduling of interscholastic athletics. As a result of the aforesaid directive, the NJSIAA issued a report on May 14, 1980 which delineated scheduling inequities involving urban, parochial and rural schools. This report recommended a restructuring of leagues and conferences in order to remedy the above-cited inequities.

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In response to the above report, the Commissioner wrote the following letter to the NJSIAA:

> I have read the report of the NJSIAA concerning discrimination in the scheduling of high school athletic events and I find it to be thorough and persuasive. The report documents a clear pattern of inequity in the scheduling of events and in the formation and selection of conferences. A systematic bias against urban schools exists. The conclusions in the report are quite disturbing and demand action. I commend the willingness of the association to call a meeting in December, 1980 for the purpose of discussing the rearrangement of leagues....
>
> It is my view that alternatives to the suggested rearrangement of leagues might also be considered. Empowering the association to assign a school to an appropriate conference if it has been excluded unfairly; requiring each school in a conference to leave several games unscheduled and authorizing the association to schedule those games with schools of equal size; and establishing new incentives and disincentives in the quality point system which would enhance scheduling opportunities for urban schools are possible alternatives which might be considered if the proposed solution is impractical.
>
> I do not believe that this office should develop the remedies for the problems noted in your report or even guidelines for such remedies unless the NJSIAA fails to meet the issues itself. A solution which emanates from your membership and is self-imposed is preferable to one imposed by the state. As noted previously, the inequities described in your report are serious and must be remedied. I call upon you to adopt by January 1, 1981 a plan that will ensure equality of opportunity to schedule athletic events for the 1981-82 school year and all years thereafter.
>
> In the Matter of the New Jersey State Interscholastic Athletic Association's Proposed Realignments of Athletic Leagues and Conferences, 1982 S.L.D. at 553-54

In response to the Commissioner's mandate, the NJSIAA amended its Constitution to assert control over membership in leagues and conferences. Despite some resistance from the membership, the NJSIAA organized and established a process for league and conference realignment which ultimately resulted in the submission of a report realigning athletic leagues and conferences.

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The Commissioner thereupon directed a series of regional hearings before an ALJ with final review by him to hear all arguments relative to the proposed realignment. The ALJ issued a report to the Commissioner on May 4, 1982 essentially recommending the approval of the leagues and conferences with slight modification. On May 28, 1982 the Commissioner adopted the ALJ's report and recommendations. The approved realignment of leagues and conferences, as well as a challenge to the authority of the Commissioner to require NJSIAA to undertake such a realignment under the provisions of N.J.S.A. 18A:11-3 et seq., was ultimately upheld by the Courts. (See Olympic Conference v. New Jersey State Interscholastic Athletic Association and Dr. Saul Cooperman, Commissioner of Education of the State of New Jersey (unpublished) N.J. Superior Court, Appellate Division A-4986-81T1, March 9, 1983.) Firmly established by the aforesaid proceeding and decisions was not only the authority of the Commissioner to direct the realignment of leagues and conferences, but also to assure that such realignment is carried out in a manner which assures equality of athletic opportunity to all students and schools in the State of New Jersey.

The realignment of leagues and conferences which has produced this appeal represents the third such realignment undertaken by the NJSIAA.

Prior to undertaking a consideration of the appeals herein, the Commissioner notes the criteria adopted by the Executive Committee of the NJSIAA to guide the deliberations of its Special Committee in considering applications for league or conference membership. The original six criteria were as follows:

1. Size of schools involved.

2. Geographic location of schools.

3. Nature of total athletic program and facilities.

4. The effect on other leagues and their existing relationships should the request to move from one league to another be approved.

5. Administrative personnel for programs offered.

6. Consideration must be given to the financial burden placed upon the school. (Report of NJSIAA Special Committee on Leagues and Conferences, January 13, 1988, at p. 5)

Additionally, the NJSIAA Executive Committee added a seventh criterion to conform with the Commissioner's directive relative to ensuring equality of athletic opportunity:

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7. Any negative effect that the transfer might have upon the present balance of minority and non-minority schools in a league or conference, at variance with the mandate of the Commissioner of Education in November, 1979. (Id., at p. 12)

BASIS OF APPEALS

A. Immaculata High School

Petitioner Immaculata High School is a coeducational parochial school located in Somerville which sought to leave the Mountain Valley Conference (MVC) and join the Mid-State Conference (MSC). Petitioner Immaculata contends that the reason given by the MVC for refusing to permit withdrawal and the MSC for refusing admission are contradictory. The reasons advanced by the MVC in denying withdrawal contended that withdrawal would increase travel time for remaining members and would remove good outdoor athletic facilities and an expanded sports program from the conference. On the other hand, petitioner alleges that the MSC rejected Immaculata because it had limited on-site facilities and its athletic program was not compatible with that of other conference members.

Pursuant to the procedure established by the NJSIAA governing conference realignment, a Special Committee on realignment was created to review the actions taken on applications by individual schools for admission to and withdrawal from leagues and conferences and to recommend an overall plan to the Executive Committee of the NJSIAA. It is the contention of Immaculata that the Special Committee did not address the contradictory reasons presented to it by the two conferences, nor did it in any manner address what it considers to be its valid reasons for withdrawing from the MVC and seeking membership in the MSC.

Primary among the reasons advanced by Immaculata for seeking withdrawal from the MVC is the average 21.71 miles it must travel to away games with its concomitant impact upon lost time in class due to early dismissals and the wear and tear of travel to and from games, as well as from school to home after games. By contrast, Immaculata contends that admission to the MSC would place the school within one and one-half miles of three conference members and reduce average travel distance to 9.32 miles.

Further, Immaculata disputes the reason advanced by the Special Committee that Immaculata's withdrawal from the MVC would upset the balance between urban and suburban schools in that conference. Since balance between urban and suburban districts is not one of the criteria enunciated by the NJSIAA to guide its deliberations on realignment, Immaculata contends that such phraseology must refer to criterion No. seven, namely a balance of minority enrollment in a conference. In that regard, Immaculata disputes the accuracy of the statistics utilized by the NJSIAA for the following reasons:

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1. No breakdown of minority enrollment by grade was available.

2. Minority enrollment figures used do not permit a direct comparison of the percentage of minority enrollment between districts since NJSIAA clumped all minorities (Blacks, Hispanics and Asians) together and thus created a distorted picture of the actual degree of balance existing in the various conferences. Further, Immaculata argues that the report of the Special Committee applies the seventh criterion inconsistently since, by its own admission, the Newark high schools are more than 90% racial minorities and yet they were denied membership in suburban conferences surrounding the City of Newark.

Finally, Immaculata protests the willingness of the Special Committee to admit Phillipsburg to the MSC despite the Committee's acknowledgement that the composition of its pupil population is essentially the same as Immaculata's, as well as Phillipsburg's stubborn refusal to give up its Thanksgiving game with Easton High School in Pennsylvania.

In the alternative, Immaculata urges the creation of a tri-county conference consisting of all schools in Warren, Somerset and Hunterdon Counties, as well as an all-Union County conference.

The Commissioner notes that Petitioner Immaculata submitted a second brief to the record on March 29, 1988 essentially challenging the statistics on minority enrollment utilized by the NJSIAA as well as denying that it had received adequate due process before the NJSIAA in that it is alleged that the NJSIAA rendered its determination on matters not in the record and denied the opportunity for cross-examination in the hearings. Inasmuch as the briefing schedule established by agreement among the parties called for a single brief setting forth the respective positions of the parties, the second brief and the arguments set forth therein will not be considered.

B. St. Patrick's High School

Petitioner St. Patrick's High School is a small coeducational parochial school in Elizabeth. Petitioner sought membership in the MVC in conformity with the procedure established by the NJSIAA for such application.

In rejecting St. Patrick's application, the MVC advanced the following reasons:

1. The small number of sports teams offered by St. Patrick's.

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2. Geographic locale of St. Patrick's could increase travel time and impose a burden upon other members in time and distance.

3. A current balance of teams exists in each of the divisions of the MVC.

Upon appeal to the Special Committee, the rejection of St. Patrick's by the MVC was upheld but a recommendation was forthcoming to provide St. Patrick's with permanent "first priority" scheduling.

The recommendation of the Special Committee, as contained in its report, was upheld by the Executive Committee after affording further opportunity to petitioner to be heard.

St. Patrick's contends that the reasons set forth by the MVC in denying its application for admission are inaccurate, misleading and unrepresentative.

In rebuttal to the MVC's contention that St. Patrick's small size (221 students) would exacerbate problems already existent by virtue of membership in the MVC of St. Mary's High School of Elizabeth, petitioner notes that its enrollment successfully supports varsity teams in women's and men's basketball, men's baseball and soccer and that it will shortly add women's softball. St. Patrick's contends that its small size has never resulted in forced cancellation of any athletic contest.

In further rebuttal, St. Patrick's disputes the MVC contention that its geographic location in Elizabeth would create a hardship for other conference members in travel time and lost classroom opportunity for student athletes. St. Patrick's contends that no MVC school is more than one hour from the Elizabeth area. It further contends that such argument becomes less valid when one considers that St. Patrick's already schedules ten of the current sixteen members of the MVC.

St. Patrick's likewise disputes the MVC contention that it lacks adequate athletic facilities pointing out that it has unrestricted use of both the Elizabeth Battin and Dunn Centers for basketball, Union County's Warinanco Park for baseball and Brophy Field for soccer. By way of proof of the adequacy of said facilities, St. Patrick's has attached to its memorandum in support of its appeal an affidavit from Charles Chrebeit, the Athletic Director of Roselle High School and a member of the MVC, attesting to the adequacy of the school's athletic facilities. (See Exhibit F.)

Finally, St. Patrick's contests the Special Committee's recommendation granting it "permanent first priority" scheduling with MVC members. Such permanent status precludes even future memberships in the conference as was held out as a possibility to two other schools also offered the status of priority scheduling. St. Patrick's position relative to the concept of "first priority" scheduling is best summarized by its own brief as follows:

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> Further, first priority scheduling does not allow St. Patrick's to provide any input whatsoever in the greater part of their own athletic scheduling. Mutual convenience in scheduling [is] something that is obviously strived for in all levels of interscholastic sports - the concept of permanent first priority scheduling simply would not allow this basic need for mutual convenience to be afforded to St. Patrick's.
>
> First priority scheduling gives St. Patrick's an opportunity to compete with M.V.C. members only as an outsider. The concept necessarily works to make St. Patrick's a "second class citizen" to M.V.C. members as St. Patrick's is forced to wait until the M.V.C. schools have completed their scheduling and then be scheduled at the sole convenience of the M.V.C. schools. Such a scenario obviously detracts from the N.J.S.I.A.A.'s intent to provide the ability for full scheduling for all of its members.
>
> Finally, St. Patrick's is dismayed that this permanent first priority scheduling will make them a "conference afterthought" and provide them with no opportunity to contribute to conference decisions or deliberations which will directly affect the school and its athletic programs.
> (Petitioner's Brief, at pp. 10-11)

As an alternative to the disposition of this matter by the NJSIAA, St. Patrick's offers the following alternative solutions:

1. Place St. Patrick's in the M.V.C. as a full member beginning in the 1988-89 season.

2. As the next "realignment opportunity" will not occur until 1994, place St. Patrick's in the M.V.C. as a member on a six (6) year status, with a review of their membership status and its true effect upon the conference to be made in 1994.

3. Provide St. Patrick's an opportunity for membership to the M.V.C. through "temporary first priority scheduling" for two (2) years, similar to the opportunity which was recommended by the Special Committee for the Newark Arts, Sciences and University High Schools in its report of January 13, 1988. If St. Patrick's effect upon the M.V.C. is considered to be positive, they should be provided with the option of full membership by 1990. (Id., at pp. 11-12)

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C. Newark Board

The appeal by the Board of Education of the City of Newark to the Commissioner of Education is presented in response to the affirmance by the NJSIAA Executive Committee of the report and recommendations of the Special Committee on Leagues and Conferences. The Special Committee's report, after hearing an appeal from the Board of Education of the City of Newark, affirmed the separate denials of the applications for membership in the individual conferences of the seven members of the current Newark City League and the three independent special high schools.[1]

The several reasons for such denial are set forth in detail in the Report of NJSIAA Special Committee on Leagues and Conferences, January 13, 1988, at pp. 30-38 and are incorporated herein by reference. Within the context of the Special Committee's reasons, the report recommended that

> ***it be charged with developing a set of specific goals with Newark representatives to be achieved by the Newark City League schools over the next three years. Those goals would be in the areas of programs, staff and facility improvements. Once these goals have been set, the Special Committee recommends that it be further charged with monitoring the progress of the Newark City League, over a three year period, in reaching those goals. During the three year monitoring period, it is recommended that the NJSIAA's central office, in conjunction with the surrounding conferences, provide supplemental scheduling of contests for the Newark City League schools. The Special Committee also recommends that if the formulated goals are achieved by the Newark City League, some permanent supplemental scheduling arrangement should be established through the offices of the NJSIAA***."
>
> (Report, at pp. 35-36)

The Committee further recommended that the three special high schools in Newark (Arts, Science and University) be incorporated into the Colonial Hills Conference (CHC) by way of a phased process of goal setting, monitoring with "first priority"

---

[1] The specific applications sought were:

Weequahic H.S. to Iron Hills Conference
Science H.S. and Arts H.S. to Colonial Hills Conference
Vailsburg H.S. and West Side H.S. to Northern Hills Conference
University H.S. and Central H.S. to Mountain Valley Conference
Barringer H.S. to Northern N.J. Interscholastic League
East Side H.S. and Shabazz H.S. to Watchung Conference

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scheduling during the three year period of monitoring and ultimately full membership if the goals were achieved after the three years.

The appeal of the Board of Education is essentially based upon the following unrefuted facts:

1. The Newark City League is composed of seven senior high schools varying in enrollment from 751 to 1,913. (The three independent high schools have enrollments varying between 294 and 440 students.)

2. The student populations of these high schools are predominately minority and in the lowest socioeconomic category established by the State Department of Education. (See Chart F in Report.)

It is the contention of Newark that it has experienced extreme difficulty in obtaining scheduling for games outside the city. (See Transcript of December 4, 1987, at pp. 110-11.)

By virtue of such difficulty, the city schools have been allegedly relegated to competing amongst themselves and/or to traveling vast distances in order to obtain a full schedule of games, including games against Warren Harding High School and Hillhouse High School in the State of Connecticut. (See Presentation of the Board of Education of the City of Newark to the Executive Committee of the NJSIAA, dated February 10, 1988, at p. 4)

It is further contended by Newark that such alleged athletic isolation results in effectively segregating the minority student athletes of the City of Newark from their white peers in the surrounding suburban communities who are members of the conferences which the city schools seek to enter.

The undesirable effects of the racial isolation complained of by Newark are set forth in a position paper developed by a consultant, Dr. Eileen Sweet, to the Newark Board and cited in petitioner's brief as follows:

> ***[S]egregation of high school athletic leagues which excludes inner city minority member youngsters from regular competitive sports participation with suburban students have negative psychological effects on both groups. It prevents each from developing a strong sense of self by learning about those who are different. It deprives suburban youngsters of the opportunity for preparing for adult cooperative and competitive interactions in vocational pursuits. It intensifies the minority student's belief that his or her efforts will not result in success.***
> (Petitioner's Brief, at p. 6)

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By way of legal argument, Newark contends that the denial of its applications for membership in leagues and conferences surrounding the City of Newark is arbitrary, capricious and unreasonable. In support of such contention, petitioner cites the fact that the impetus for placing responsibility for reorganizing leagues and conferences in the hands of the NJSIAA was the discriminatory practices relative to membership which existed prior to the Commissioner's mandate of 1979. As a result of such mandate, the NJSIAA developed the six criteria set forth, ante, in this decision and added a seventh designed to ensure that subsequent determinations made relative to leagues and conferences were made in conformity with the Commissioner's mandate of 1979.

In applying the aforesaid criteria, Newark contends that the Special Committee predicated its conclusion not to approve the application of the Newark high schools upon only three of the seven criteria:

> ***When three of the seven controlling criteria for conference admission are therefore applied to the Newark City League (No. 3, nature of total athletic program and facilities; No. 5, administrative personnel; and No. 6, the financial burden placed upon other schools, Newark has not persuaded this Committee that it can be absorbed in the five surrounding conferences, which have made a much more substantial commitment to their athletic programs. (Petitioner's Brief, at p. 15 citing report at p. 35)

It is Newark's contention that a mere prima facie showing that its status violates the Commissioner's mandate of 1979 should be sufficient to overcome any alleged deficiencies relative to the other criteria.

Notwithstanding any allegation of inadequacy of program, facilities and personnel, Newark contends that it has demonstrated through testimony of its witnesses at the hearings that it is willing and anxious to remedy any deficiencies and has already made substantial progress in doing so. Further, Newark avers that neither the Special Committee nor the Executive Committee considered the unique nature of the disparity of size between the seven City League teams and the problem that such disparity creates in terms of scope and depth of program. As to the alleged financial burden upon other schools due to increased travel costs, Newark disputes or minimizes such financial burden by arguing that all the city schools are accessible by major highways and that any significant financial burden which might occur as a result of Newark high schools becoming part of a suburban conference would fall more heavily upon Newark than the suburban schools.

Newark further disputes the logic of the NJSIAA's contention that the addition of the Newark high schools to the suburban conferences would upset the delicate racial balance of these conferences.

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Such position lacks logic in that it relegates the Newark schools to playing in a league (Newark City League) which is virtually 100% minority enrollment.

Newark's position in this report is best expressed as follows:

> A fair reading of the documents, testimony, and arguments presented in this matter inexorably must lead to the conclusion that respondent has acted in prejudicial manner resulting in a two-tiered system of interscholastic athletics--one for petitioner's schools, and one for everyone else. For all of the foregoing reasons, petitioner respectfully submits that the action of the NJSIAA is arbitrary, capricious, and unreasonable and that there are compelling reasons why said action should be modified by the Commissioner of Education. (emphasis in text) (at p. 22)

Ultimately, Newark's argument rests upon its contention that the denial of admission of Newark schools to the conferences to which they applied by the NJSIAA and its various committees represents a denial of the rights conferred on the pupils of the City of Newark by the Fourteenth Amendment to the United States Constitution and Article 1, para. 5 of the New Jersey Constitution, as well as various state and federal acts and code. (42 U.S.C. sec. 1983, 2000(c) and (d); NJSA 10-5.1 et seq.; N.J.S.A. 18A: 36-20; and N.J.A.C. 6:4-1.1 et seq.)

In support of its position, Newark cites the finding of the United States Supreme Court in Brown et al. v. Board of Education of Topeka et al., 347 U.S. 483 (1954) relative to the impact of segregation upon the hearts and minds of children so separated. Newark further points out the New Jersey Supreme Court decision in Booker v. Plainfield, 45 N.J. 161 (1965) which held that the New Jersey Constitution required action against the adverse effects of de facto segregation which did not result from direct governmental action.

Newark reiterates that regulations of the State Board of Education (N.J.A.C. 6:4-1.1 to 5) prohibit discrimination in interscholastic athletics. While petitioner recognizes that the NJSIAA is a voluntary association, it notes that jurisdiction and oversight of the rules, regulations and actions of such associations have been granted to the Commissioner of Education by N.J.S.A. 18A:11-3 and affirmed by the Courts in Olympic Conference v. NJSIAA, supra.

In light of the foregoing, Newark requests that the Commissioner set aside the action of the NJSIAA and its Committees and grant the Newark City high schools immediate and unconditional admission into the leagues and conferences to which they applied.

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RESPONDENTS' ARGUMENTS

A. Immaculata's Appeal

By way of response to the appeals as set forth herein, the NJSIAA sets forth the standard of review that the Commissioner has applied in reviewing remedial plans to assure equal opportunities in athletics:

> It is well settled that the realignment directed by NJSIAA is subject to review and acceptance by the Commissioner of Education. N.J.S.A. 18A:11-3; IMO New Jersey [State] Interscholastic Athletic Association's Proposed Realignments of Athletic Leagues and Conferences 1982 S.L.D. 544 (Initial Decision); 1982 S.L.D. 598 (St. Board Decision); The Olympic Conference v. NJSIAA, et al., (App. Div. 1983) (Unpublished Slip Opinion, A-4986-81T1, March 9, 1983). The standard of review consistently applied by the Commissioner has been that he will not substitute his judgment for that of the NJSIAA absent a showing of arbitrary, capricious or unreasonable behavior. (See Board of Education of the Rumson-Fair Haven Regional High School District v. Shore Conference, et al., 1986 S.L.D. (Commissioner's Decision)(Unpublished Slip Opinion, C.D. #209-87, August 19, 1987).***
>
> (Respondent's Brief, at p. 16)

In urging the rejection of Immaculata's appeal, the NJSIAA contends that its action in rejecting Immaculata's request to join the MSC represents nothing more than an application of its judgment to the seven criteria for league membership. Inasmuch as Immaculata was merely denied transfer to a league which it preferred but none the less remains a member of a league and conference, the Commissioner should not, pursuant to the standard iterated above, substitute his judgment for that of the NJSIAA.

B. St. Patrick's Appeal

NJSIAA's response to St. Patrick's contentions rests upon its willingness to provide "first priority" scheduling to that high school to ensure it a full complement of athletic contests. It further argues that such an offer at the time of the hearing seemed to comport with St. Patrick's desire. It is the NJSIAA's contention that St. Patrick's appealed only when it learned from the MVC that the "first priority" scheduling would not necessarily be limited to Valley Division, consisting of Group I schools, but would likely include members of the Mountain Division which consists of larger schools some of whom St. Patrick's already plays. At such point, contends the NJSIAA, St. Patrick's filed this appeal. In sum, the NJSIAA asks the Commissioner to support its determination for the following reasons:

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> In sum, after stating that it would play any school in the MVC, St. Patrick's now seeks to have the Commissioner assure that it will only play the smallest schools within that Conference, thereby assuring a distinct competitive advantage. This is a school that has chosen to provide only one girls' program, while most schools throughout the MVC have provided anywhere from six to eleven girls' programs. It would be patently unfair to the other schools in the MVC, which have made a much more substantial commitment to broadening participation among their students, to allow a school to avoid that same commitment and at the same time, be accorded a softer schedule to assure competitive success. In conclusion, St. Patrick's appeal has nothing at all to do with the Commissioner's mandate. Rather, it is an attempt by a school to exploit the realignment process for its own competitive advantage. (emphasis in text)
>
> (Repondent's Brief, at p. 22)

C. Newark Board's Appeal

The NJSIAA takes particular exception to the tone of the Newark brief contending such brief is inflammatory and misportrays facts. The NJSIAA cites as contradictory Newark's portrayal, on the one hand, of denial to the Newark Schools of admission to the leagues and conferences to which they applied as being racist and, on the other, their praise of the NJSIAA's attempts to maintain racial balance in the suburban leagues.

The NJSIAA also takes exception to the manner in which Newark characterized its treatment at the hearings. Such characterization, submits the NJSIAA, is designed to create the appearance of arbitrary and capricious behavior on the part of the NJSIAA Committees. In response the NJSIAA submits the following rebuttal:

1. The Special Committee was obligated to extend the alloted (sic) time for its hearings by five additional hours, so as to accomodate (sic) the arguments of Newark that they had not been fully advised of the reasons for conference denials (Report at 15, 21A). That absence of information was caused primarily by the seven Newark City League schools failing to submit applications to the conferences, despite clear written instructions in March 1987 to do so (See 5A, Section D); and an insistence to proceed in a trial type, adversarial manner during the Special Committee proceedings.

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2. On January 13, 1988, the NJSIAA Executive Committee adopted explicit directions to all involved schools and conferences that they were free to submit written arguments to the Executive Committee prior to February 1, 1988, so that the Committee could review those materials in advance of the scheduled February 10, 1988 hearing. (4sa). The schools and conferences were also advised that any oral presentations would have to be limited to fifteen minutes (Id.).

3. On January 18, 1988, all involved attorneys, including Newark's then counsel, were sent a separate memorandum reiterating the appeal procedures adopted by the Executive Committee on January 13th, clearly stating that the fifteen minute limitation applied to "school districts" as well as schools and conferences. (6sa).

4. Newark failed to submit any written materials but merely requested oral argument on February 1, 1988, thereby limiting itself to a fifteen minute oral presentation. (8sa).

5. All parties were advised on February 4, 1988 of a specific agenda for the appeals hearings before the Executive Committee on February 10, 1988, scheduling Newark for 1:45 p.m. (9sa, 10sa).

6. Every one of the participating schools and conferences arrived on time to provide their presentations, except Newark which arrived twenty-five minutes late (3T146-3 to 17).

7. When the Newark representative, Mr. Mallory began his belated presentation, Newark attempted to distribute a twenty page written statement (Na-3) in violation of the instructions that had been sent to all participants. (3T158-4 to 159-14).

8. When the Newark representative exceeded the fifteen minute limitation by five minutes, he was permitted to summarize for a few more minutes (3T175-20 to 176-7). When he reached twenty-five minutes, he was finally asked how much more time he would need; at which time he stated he needed another ten minutes. Only then was a motion adopted to terminate his formal presentation. (3T178-5 to 181-18).

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> 9. After Mr. Mallory's twenty-five minute formal presentation was curtailed, there was an extensive colloquy between the Executive Committee and Newark representatives, which lasted until 3:15 p.m. (3T182-1 to 199-22). Thus, Newark's refusal to adhere to ground rules which every other school and conference agreed to do, caused a delay of one hour and fifteen minutes in the proceeding. (See 10sa).
>
> For Newark to now argue before the Commissioner that it was somehow unfairly treated by the NJSIAA is nothing short of preposterous. Of the dozens of schools and conferences that participated in the year long process culuminating in the February 10th action of the Executive Committee, only Newark failed to complete appropriate applications to conferences; only Newark insisted upon prolonging the Special Committee proceedings, by urging a change in the format to a trial type proceeding, thereby lengthening the Special Committee hearings by five hours; only Newark arrived late for the Executive Committee proceedings (twenty-five minutes); and only Newark attempted to violate the procedures of the NJSIAA in attempting to distribute any written materials, which should have been submitted in advance, so the Executive Committee could carefully review its position. The irony of Newark's unfair portrayal of the proceedings is that it was accorded extraordinary and special consideration throughout these same proceedings, despite criticisms by other schools and conferences, who were never accorded that same treatment. (2T238-16 to -25; 3T151-20 to-22).
>
> (Respondent's Brief, at pp. 25-27)

As evidence of its fair treatment of the Newark Schools, the NJSIAA points to its decision to permit the admission of Newark's three small special high schools (Arts, Science and University) to the Colonial Hills Conference after a three year "transition" period of "first priority" scheduling.

The NJSIAA decries what it believes to be the attitude of Newark

> ***that it is entitled to full membership in any conference that it chooses to apply to, even if it does not come close to satisfying the programmatic, staffing and facilities criteria

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which all other members of the NJSIAA have had to adhere to over the last six years.
(Respondent's Brief, at p. 29)

The NJSIAA rejects Newark's argument that it is perpetuating "racial isolation." By way of rebuttal of such contention, the NJSIAA contends that it has set forth seven valid reasons for denying the applications of the Newark Schools as recommended that Newark and the Association develop specific goals to improve the programs, staff and facilities of Newark while the Association would actively work with the conferences to ensure immediate supplementary scheduling. It summarizes its position as follows:

> The Special Committee believed that it would not only be unfair to the surrounding conferences to afford immediate membership to these schools on a "scatter gun" basis, but would be unfair to the Newark youngsters themselves. Certainly, the thousands of Newark students who are now denied a full athletic program by their own schools, are not benefitted by merely transplanting those same limited programs into the suburbs. Instead, the NJSIAA wants to provide positive inducements to the Newark schools to expand their athletic offerings by establishing goals with Newark on a cooperative basis. At the same time, the report envisioned a substantial increase in interscholastic contests for Newark's students, through mandatory supplemental scheduling with the suburbs.
>
> It is difficult to understand Newark's argument, when it speaks about "racial isolation" for the Report contains a positive blueprint for greatly expanding opportunities for its student-athletes, while at the same time seeking to restore a once viable Newark City League.
>
> Brushing all rhetoric aside, it is urged that the Commissioner affirm the Report of the NJSIAA and allow this State Association to take immediate steps to assist Newark's youngsters. To grant the appeal of the Newark Board of Education would be a gigantic step backward. That Board of Education has not sustained its heavy burden of showing that the Report in any way violates the mandate of providing opportunities for full athletic scheduling for urban schools. Accordingly, the Report should be approved.
> (Respondent's Brief, at p. 30)

FINDINGS

The Commissioner has carefully reviewed the record and transcripts in this matter as developed by the parties in their

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appearances before the Special Committee on Leagues and Conferences and the appeals before the Executive Committee of the NJSIAA, as well as the submissions entered by each of the parties on appeal. In reviewing the aforesaid record, the Commissioner is particularly mindful of the standard of review which he has applied in matters relevant to appeals from the actions and decisions of the NJSIAA, namely the according of a presumption of correctness to the determination of that organization while not substituting his judgment for that of the organization absent a violation of statute, regulation or arbitrary or capricious behavior. Rumson-Fair Haven, supra, and Olympic Conference, supra

In applying the aforesaid standard to the record in this matter the Commissioner will deal with the appeals of each of the petitioners individually.

A. Immaculata High School

The Commissioner has carefully reviewed the reasons presented by Immaculata for seeking withdrawal from the MVC and admission to the MSC. The principal reason as perceived by the Commissioner is the distance which Immaculata is required to travel in order to fulfill its athletic schedule within the MVC as opposed to the distances which would be required if it were a member of the MSC. A review of said distances as contained within the application for transfer of membership submitted by Immaculata does bear out its contention that the average distance required to be traveled as a member of the MVC as opposed to the MSC is considerably greater. (See Application.)

The Commissioner is mindful of the importance to be attached to such logistical considerations insofar as they bear upon the amount of instructional time lost by virtue of being required to travel to outdoor games at an early enough hour to ensure them completion before dark. He is likewise sensitive to the impact of such matters on the ability of athletes to meet their primary responsibilities as students. Notwithstanding the above, the travel time argument would not by itself be sufficient to warrant an overturning of the NJSIAA's determination in this case nor to support a charge of arbitrary or capricious action.

In this matter, however, Immaculata does point out one factor which raises serious question as to the degree to which the Executive Committee gave careful and attentive consideration to the arguments posed on appeal by Immaculata. Immaculata points out that the reason advanced by the MVC for keeping Immaculata was diametrically opposed to one of the reasons given by the MSC for not admitting, namely the adequacy of the facilities available for athletic activity. Although this discrepancy was presented to the NJSIAA Executive Committee by Immaculata in its appeal, the Committee never responded to that specific discrepancy but summarily affirmed the actions of the Special Committee.

The Report of the Special Committee denies the withdrawal of Immaculata and Ridge High School from the MVC because such withdrawal would upset the balance between urban and suburban

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schools in the MVC. Since none of the criteria adopted by the NJSIAA refers to urban/suburban balance, it must be assumed that such reference is to racial balance.

Although Immaculata contends that the percentage of minority enrollment in the MVC is not changed by its withdrawal since Ridge High School remains in that conference and its own minority enrollment is not included in calculating the total percentage of minority enrollment, such contention is in error. (See Petitioner's Brief, Exhibit B.)

A review of the aforesaid exhibit indicates that Immaculata's calculations are in error since a total minority enrollment of 1422 divided by a total enrollment of 6274 calculates at close to 23%, rather than the 20% indicated by Immaculata.

On balance, however, the Commissioner finds that the NJSIAA's failure to specifically respond to the discrepancy between the reasons for retention of Immaculata by the MVC and its denial by the MSC raises serious question as to the degree to which the Special Committee and the Executive Committee objectively considered Immaculata's appeal. In light of such determination, the Commissioner directs that the NJSIAA immediately undertake steps to reconsider the appeal of Immaculata specifically as it relates to the matters raised in this decision relative to the aforesaid discrepancies. The Commissioner retains jurisdiction for purposes of hearing any further appeal which results as a consequence of his remanding of this matter for reconsideration.

B. St. Patrick's High School

The Commissioner has carefully considered the arguments of the parties as they relate to this appeal. Based upon that review, he finds the MVC's reasons for non-admission of St. Patrick's into that conference, and the subsequent affirmance of that refusal by the Special Committee and the Executive Committee, to be without substance. The contention that St. Patrick's is too far away from conference schools to accommodate conference schools rings hollow considering the fact that St. Patrick's already schedules ten of the sixteen league members. The Commissioner is likewise unpersuaded by the contention that St. Patrick's lacks adequate athletic facilities as contended by the MVC. The Commissioner notes the fact that petitioner's contention as to the availability of both adequate outdoor and indoor facilities is not specifically addressed in respondent's brief in support of its earlier actions. In light of such failure to address an essential criterion which served as a basis for denial of St. Patrick's application for membership, it must be assumed that the NJSIAA is prepared to concede at this point that such contention lacks sufficient basis.

Additionally, while the Commissioner notes that St. Patrick's athletic program is not as extensive as most of the other members of the MVC, such limited program is obviously a consequence of the fact that St. Patrick's is a school with a small student population. In the Commissioner's view, size, although an

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appropriate criterion in making determinations as to groupings, cannot be used as an absolute bar to athletic conference membership. While the absence of teams in all sports may prove to be an inconvenience to the other conference members, there are a sufficient number of schools with broader athletic programs in both boys and girls sports to ensure those conference members full scheduling.

Consequently, in light of the fact that the denial of St. Patrick's application for membership in the MVC was predicated upon two criteria, size and location, which are clearly beyond that school's ability to control, and the third criterion, lack of facilities, has been rebutted to the Commissioner's satisfaction, the Commissioner finds and determines that the action of the MVC in denying membership to St. Patrick's was arbitrary and capricious, as was the action of the NJSIAA in supporting such conclusion.

The Commissioner therefore directs that the NJSIAA take such steps as necessary to integrate St. Patrick's High School of Elizabeth into the MVC.

C. Newark Board

The Commissioner has carefully considered the arguments raised by the parties relative to the application of the seven high school members of the Newark City League and the three special high schools for admission to various suburban conferences as set forth earlier in this decision. In reviewing these arguments and the context from which they arise, certain factors emerge as being unmistakably clear.

First and foremost is the fact that the Newark City League is composed, with the exception of one school, of student bodies which are almost entirely Black and Hispanic. Additionally, it is an undisputed fact that the seven high schools which comprise the Newark City League vary significantly in numbers of student enrollment so that they range in athletic classification from Group II to Group IV. (The three independent special high schools are all Group I.) Equally undisputed is the fact that the result of the rejection of the application of the Newark high schools by the conferences to which they had applied and the subsequent affirmance of those rejections by the Special Committee and the Executive Committee of the NJSIAA has relegated the seven members of the Newark City League to scheduling the bulk of their athletic contests among themselves.

It should be further noted that the Special Committee does recommend and the Executive Committee does adopt a process whereby the NJSIAA is to assist the city schools to obtain supplemental scheduling with surrounding conferences during a three-year period in which the Newark Schools work to achieve certain goals to be monitored by the NJSIAA. Nowhere, however, does the report or the affirmance by the Executive Committee guarantee admission to the surrounding conferences upon attainment of the goals. In fact, the Special Committee Report merely recommends

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> ***that if the formulated goals are achieved by the Newark City League, some permanent supplemental scheduling arrangement should be established***. (emphasis supplied)
> (Report, at p. 36)

Presumably, notwithstanding the unquestioned minority composition of the student bodies of the Newark City League teams and the presumed attainment of the goals established, the Newark City League schools will not be permitted to obtain admission into the surrounding suburban conferences.

Having established the above-cited factors, the Commissioner deems it appropriate to examine the reasons for the rejection of the applications of the Newark City League teams as well as those of the three independent high schools by the various leagues and conferences. Essentially, the aforesaid applications were rejected because the conferences and the responsible NJSIAA Committees deemed Newark did not meet at least three of the seven criteria established for purposes of making decisions relative to conference and league membership (nature of the total athletic program and facilities, administrative personnel, and the financial burden placed upon other schools). See Report, at pp. 31-35.

In examining the record of the proceeding before the Committees and the written submissions, it becomes quite clear that the exact nature of the inadequacies of the physical facilities were never specifically elaborated upon by either the conferences or the NJSIAA Committees. While the less than adequate nature of the athletic programs of the Newark City Schools, particularly in girls sports, is documented by the record, it remains to be determined whether this factor is of sufficient weight to result in an adverse determination. Likewise admitted by the Newark City Schools is the absence of full-time athletic directors in each high school although the Newark Board does provide for part-time athletic managers. Of particular concern to the Commissioner in evaluating the weight to be assigned to the aforesaid reasons for rejecting the applications of the Newark schools is the absolute failure of the NJSIAA Special Committee or the Executive Committee to respond to or consider the testimony of James Kapalis and William Mallory who testified extensively on the significant improvements undertaken by the Newark City Schools to improve and extend their physical facilities as well as the willingness of the Newark Board to create a position of athletic director in each high school. (Tr. 125-152, December 4, 1987)

This testimony which specifically addressed two of the three major concerns raised by the leagues and conferences was seemingly never considered or at least addressed by the Special Committee prior to rendering its recommendations. Nor does there appear to be any indication that the Executive Committee considered such testimony either in reviewing the recommendations of its Special Committee or in finalizing its own deliberations. Such omissions, in the Commissioner's view, must be accorded significant weight in concluding whether the actions of the NJSIAA in denying

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membership to the Newark high schools into the leagues and conferences to which they applied are to be deemed arbitrary or an exercise of its judgment.

The Commissioner has further examined the contention by the leagues and conferences that being required to travel to Newark would result in a significant financial burden. Assessing the validity of such an assertion would require a careful and detailed analysis of current athletic transportation costs of each of the conference schools as opposed to how those costs would be effected by virtue of being required to travel to Newark. However, even conceding that these costs might be higher, there is little doubt that the financial burden to the Newark schools having to travel to all the surrounding suburban schools would be greater.

Finally, and most importantly, the Commissioner must address the application of the seventh criterion to the situation at hand. Clearly the Commissioner's mandate of 1979 as reaffirmed by the Commissioner in the first conference realignment in 1982 must bear more heavily than any other single criterion. That mandate and affirmance made absolutely clear the commitment of the Commissioner and the State of New Jersey to ensuring that there would be "***equality of opportunity to school athletic events in the future***." (Olympic, supra, Slip Opinion, at p. 3)

It hardly requires repeating in 1988 that our laws, our State Constitution, our legal precedents and the policy and regulations of the Commissioner and the State Board of Education all require equality of educational and athletic opportunity. Nor can it reasonably be argued pursuant to Brown v. Board of Education, supra, and Booker v. Plainfield, supra, that segregation, be it "de jure" or "de facto," is inconsistent with long-standing state policy.

Consequently, determinations by the NJSIAA's Special Committee and Executive Committee which have the result of effectively isolating the seven senior high members of the current Newark City League, all of whom save one have minority populations of over 90% must, in the Commissioner's view, be considered in violation of the 1979 mandate, as well as the letter and spirit of state legal precedent. Notwithstanding the fact that the Newark schools may arguably have both organizational and facilities shortcomings, although the record is sparse as to any careful documentation and analysis of the latter, failure of the NJSIAA to definitively address the fundamental issue of racial isolation beyond the vague assurance of permanent supplemental scheduling for the seven City League members must be construed as arbitrary.

Furthermore, the Commissioner finds the argument set forth by the NJSIAA, that dissolving the Newark City League and dispersing the members to the surrounding suburban conferences would seriously impact upon the racial balance of those conferences, to be both inconsistent and self-serving. To accept that reasoning would require the Commissioner to consent to the continued racial isolation of the seven member Newark City League in order to assure the continued integration of the surrounding suburban conferences.

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The Commissioner is aware that the admission of any one of the seven Newark City League teams to a suburban conference diminishes the viability of that league thereby reducing the option available to the NJSIAA to either total rejection of all applications to suburban conferences or dissolution and total dispersion of that league. Since continued racial isolation in the face of the desire of the Newark Board of Education to seek membership in the surrounding conferences and leagues for all of its seven comprehensive high schools and its three special high schools cannot, in the Commissioner's view, be justified in light of both the Commissioner's 1979 mandate and the legal and judicial posture of this state, the Commissioner therefore directs the following remedy:

1. The three special high schools are to be admitted into the Colonial Hills Conference as full participants no later than the 1989-90 academic year. During the 1988-89 academic year the NJSIAA's plan for providing "first priority" scheduling is to be implemented.

2. The seven member high schools which comprise the Newark City League are to be integrated into those leagues and conferences to which they have made formal application or in the alternative into such leagues and conferences which the NJSIAA deems most appropriate in order to minimize the impact of inclusion of the Newark schools upon the existent racial balance in those leagues and conferences.

3. It is directed that such integration of the Newark City League schools into the surrounding conferences be carried out by the beginning of the 1989-90 academic year. To ensure orderly compliance with the aforesaid determination the parties are directed to provide to the Commissioner by October 1, 1988 a mutually developed schedule for implementing the above determinations.

4. Finally, the Commissioner directs the Board of Education of the City of Newark and the NJSIAA to provide him with a report by October 1, 1988 on the progress made in implementing the assurances that the Newark Board representatives presented before the Executive Committee of the NJSIAA relative to meeting those deficiencies of program,

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facilities and administrative personnel which constituted the basis for the original denial of admission by the individual conferences and the Special Committee. The Commissioner retains jurisdiction for purposes of adjudicating any differences which may arise between the parties both as to specific conference membership or timely compliance.

IT IS SO ORDERED this 8th day of June 1988.

COMMISSIONER OF EDUCATION

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6923-87
AGENCY DKT. NO. 306-10/87

WILLIAM HANLEY,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,
Respondent.

Nancy Iris Oxfeld, Esq., for petitioner (Klausner, Hunter & Oxfeld, attorneys)

David B. Rubin, Esq., for respondent (Rubin, Rubin & Malgran, attorneys)

Record Closed: March 15, 1988 Decided: April 29, 1988

BEFORE **JOSEPH LAVERY,** ALJ:

William Hanley (petitioner) appeals to the Commissioner of Education for relief. He asserts that he has been improperly removed from his tenured status as a teacher of music by his former employer, the Board of Education, Township of East Brunswick (respondent). In answer, respondent denies petitioner has been removed, and counters that, instead, he resigned.

Today's initial decision is in favor of respondent Board of Education.

PROCEDURAL HISTORY

After timely appeal, the Commissioner of Education declared this matter a contested case, pursuant to N.J.S.A. 52:14B-9 and 10. The Commissioner filed it with the

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Office of Administrative Law (OAL), on October 19, 1987. Subsequently, the case was assigned to this administrative law judge for prehearing telephone conference, which convened on December 16, 1987. Plenary hearing was scheduled for February 17, 1988 and was completed on that date in the South River Municipal Court. Subsequently, briefs were submitted, the last of which was filed on March 15, 1988. On that date, the record closed.

ISSUES

The issue for resolution here is:

Whether petitioner tendered, and whether respondent Board properly accepted, a resignation terminating his employment in the East Brunswick School District.

Burden of Proof:

The burden of proof in this matter falls on petitioner, who must carry it by a preponderance of the credible evidence.

Undisputed Facts:

William Hanley (petitioner), before his removal, was a tenured teacher employed during a 10-month school year. By May 13, 1987, he had spent 11 years teaching in the East Brunswick School System at Churchill Junior High (Exh. P-1). However, on that date, he forwarded a letter to Ms. Brenda Witt, Assistant Superintendent-Personnel of the District. Expressing appreciation for the professional experience which he had been afforded, he nevertheless indicated that it was time for a change:

> However, I have taken some time and much thought and now feel a need to make a change in my career direction. It is with mixed feelings that I must inform you that I will not be returning to my teaching position in September, 1987. Because I have been involved and dedicated to the teaching profession for so long, I would prefer not to resign at this time, but to respectfully request a one year's unpaid leave of absence, for the 1987-88 school year. . . (Exh. P-1)

Petitioner personally brought the letter to Ms. Witt and discussed the possibility of a leave of absence. She informed him that she was of two minds. First, the leave seemed

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reasonable because of his length of employment. On the other hand, leave of absence was not appropriate for the purpose of pursuing a different career (in real estate). She indicated that she favored the latter view. On May 27, 1987, she forwarded a letter denying the leave request, consistent with that perspective. She did so after having discussed the matter with the Deputy Superintendent, Doctor Ogden (Exh. P-2). Sometime after this letter, but before June 15, 1987, Ms. Witt solicited a letter of resignation. Petitioner responded, either to Ms. Witt or her secretary, that his letter of May 13, 1987 was his resignation.

With matters at that stage, petitioner, before June 30, 1988, again discussed with Ms. Witt the impact of leaving employment in the district. Part of the discussion was focused on what effect the date his departure would have on entitlement to recently enacted COBRA* Health Benefits. Related information had been provided in the June 15, 1987 pay checks to all teachers. The content of that discussion is in dispute.

On July 9, 1987, the Board of Education "accepted" the resignation of petitioner as a music teacher at Churchill Junior High School, with an effective date of June 30, 1987 (Exh. P-3). By July 10, 1987, petitioner had learned of this action through a letter from Ms. Witt (Exh. P-4).

Petitioner then contacted the President of the East Brunswick Teachers' Association (EBTA), Ms. Rosalie Triozzi. She discussed petitioner's status with Dr. Joseph Sweeney, Superintendent of the East Brunswick Public Schools. In a letter of July 22, 1987 (Exh. P-5), she took the position that petitioner's letter of May 13, 1987 was not a letter of resignation. She argued that he continued to be employed as a tenured teacher in the East Brunswick School District, with all attendant benefits.

In a letter dated two days later, July 24, 1987, (Exh. P-6) petitioner responded to Ms. Witt's July 10 notice to him of the Board's action. He denied that the May 13 letter was a resignation, and attributed it to confusion. He asked that his present letter (dated July 24) be considered a formal resignation, in compliance with the 60-day notice required by N.J.S.A. 18A:28-8. He also asked for continuation of his health benefits under COBRA. The Board of Education never acted on this letter.

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* "Consolidated Omnibus Budget Reconciliation Act of 1985"

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In the course of time, and relying on the absence of Board action on his letter of July 24, petitioner rethought his position. In a letter of September 23, 1987, (Exh. P-7), he told Ms. Witt:

> Please notify the Board of Education that I hereby rescind my resignation dated July 23, 1987 effective September 15, 1987.

Prior to this letter, on July 23, 1987, the Board had taken action to approve petitioner's replacement by Kathleen Spadafino (Exh. P-8). When the Board refused to comply with his request for reinstatement, the present appeal was brought.

ARGUMENTS OF THE PARTIES

Petitioner's Argument:

Petitioner insists that, despite his letter of May 13, 1987, which was intended as a resignation, he had not settled on a specific date. During his second meeting with Ms. Witt, after learning of the COBRA benefits in his June 15 pay check, the Assistant Superintendant assured him that a July 5, 1987 resignation date would guarantee COBRA coverage. His renewed resignation letter of July 23 (dated July 24, 1987, Exh. P-6) was authored at Ms. Witt's request. It was meant: (a) to satisfy the 60-day notice and (b) to assure COBRA benefits. Petitioner concedes that he never specifically asked for July 5 in writing as a particular date for resignation. Petitioner recalled rescinding his resignation in September because he had time to reflect, and because he was informed that, since the Board had not acted, the resignation was not effective.

In post-hearing brief, as a matter of law, petitioner contended that he had never resigned. In the alternative, to the extent the resignation is considered specific, it has no legal meaning, since it was never accepted by the Board of Education. Moreover, the precondition for resignation, i.e. a denial of leave of absence, was never satisfied. The Board of Education had not acted on petitioner's request for the leave. Its rejection was solely a decision by school administrators. The Board could only accept a resignation in accordance with the terms of the offer. Resignation cannot be ambiguous, as here. No exact date can be determined from any of the correspondence of record. Ms. Witt's letter of August 19, 1987 confirms the fatal uncertainty surrounding the terms of the purported offer of resignation (Exh. R-1). Nevertheless, the record does show that when dates were

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discussed, they were intended to assure entitlement to COBRA benefits. This had to follow the June 30 date. By that reasoning, even if the May 13 letter were deemed a resignation, the conversations after June 15, but before June 30, between Ms. Witt and petitioner establishing a date of July 5 factually and legally rescinded that resignation. That change of heart is permissible before acceptance.

The July 9 "acceptance" of the Board assigning a June 30, 1987 date is therefore invalid. No such offer had been made. Consequently, petitioner should be restored to his employment and provided all lost salary and emoluments of that position.

Respondent Board's Argument:

Respondent Board introduced no witnesses in rebuttal. However, it submitted Exh. R-1, a written response to grievance, sent by Assistant Superintendent Witt, dated August 19, 1987. That letter concedes that after her May 27 letter informing petitioner that a leave of absence would not be granted, she did ask that petitioner submit a letter of resignation. In response, petitioner insisted that his May 13, 1987 letter was a resignation. After the June 15, 1987 pay checks, petitioner for the first time stated he wished to opt for the COBRA coverage. Ms. Witt responded that, although she did not think there would be a problem, she would check to see if this was so. After discussing the matter with another staff member, Mr. Poquette, they concluded that the June 30 cut-off would be the date honored.

As a matter of law, the Board argued that Ms. Triozzi's self-serving memorandum could be considered only as an attempt to "unresign" petitioner. From this, it can be deduced that petitioner's May 13 letter was a knowing inducement for the school district to rely on it as a letter of resignation. This is true whether petitioner (a) intended to "boot-strap" himself into COBRA coverage or (b) had sincere change of heart about career plans. The law controlling acceptance and rescission of resignations is clear. Resignation may be withdrawn any time prior to acceptance, but is final thereafter. Since the letter was not withdrawn before the Board accept it on July 9, 1987, the resignation was complete as a matter of law on that date. Neither fraud nor duress operated as offsetting factors. Petitioner's resignation was unequivocal: he would not return for the 1987-88 school year. Thus, his employment ended on June 30, 1987, when the school year 1986-87 ended.

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FINDINGS OF FACT

Therefore, after considering the testimony previously set forth, and independently assessing the credibility of witnesses and parties, as well as reviewing the record as a whole, I make the following **FINDINGS OF FACT:**

As to UNDISPUTED facts, I **FIND** those designated on pages 2 through 4 of this opinion.

As to matters which are disputed or CONTESTED, I **FIND:**

1. Petitioner intended to end his employment with the school district at the close of the school year during which he submitted his May 13, 1987 resignation.

2. The end of the 1986-87 school year was June 30, 1987. Petitioner, though tenured, was neither employed nor paid between the end of any ten-month school year in June and the beginning of the next, in September.

3. In conversations with Assistant Superintendent Witt, after he had submitted his May 13, 1987 resignation, he was told that a July 5 resignation date would be appropriate to preserve for him the COBRA benefits which he sought.

ANALYSIS

The history of this matter as presented by both sides shows that the fact of petitioner's May 13, 1987 resignation is undisputed. It is evident from petitioner's testimony and from the May 13 letter itself, that petitioner intended to conclude his career with the district at the close of the 1986-87 school year. That year ended June 30, 1987. There is no ambiguity in petitioner's May 13 decision. It is a voluntary relinquishment of his position, affording no other conclusion but that, once his obligation to complete the school year terminated, he had no intention to return. Fischer v. BOE, City of East Orange, dec. Commr. of Ed. (January 11, 1988).

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Though petitioner expressed a preference for leave of absence, this alternative was denied by the district. No citation or record of administrative practice suggests that this denial required approval by respondent Board. The denial by staff must be afforded a presumption of correctness. It was reversible only by the Board, after appeal by petitioner. None was brought.

Petitioner's efforts after his resignation to preserve certain COBRA rights, and his ultimate decision in September to "rescind" his resignation, clearly reveal a changing state of mind. Yet, nothing of record detracts from the acceptance by the Board on July 9 of the unequivocal letter of May 13, 1987. Petitioner himself concedes in all candor that he intended this letter to be a resignation.

It is true that the record also persuades that Assistant Superintendent Witt assured him a July 5 date for resignation would preserve COBRA benefits. Respondent's attempt at rebuttal, Exhibit R-1, does not provide the residuum of competent evidence necessary to off-set total hearsay testimony. N.J.A.C. 1:1-15.5. Nevertheless, this evidentiary failure does not aid petitioner. The resignation tendered by his May 13 letter was not voided by these conversations. Only one action could achieve that result. Petitioner would have had to withdraw the letter with the same level of formality that he submitted it. Only a letter clearly rescinding the May 13 resignation, submitted prior to the July 9 acceptance by the Board, would have accomplished this. It was never submitted. Kozak v. BOE, Twp. of Waterford, 1976 S.L.D. 633.

It may reasonably be argued that petitioner's conversations with the Assistant Superintendent Witt lulled him into a false sense of security. However, the conversations with Ms. Witt do not amount to fraud or duress. Neither did mistake attend the original decision to send the letter of May 13. That decision could only have been obviated by a comparable letter, before July 9, 1987.

A record disclosing petitioner's change of heart, enhanced by confusing instructions by district staff, cannot serve that purpose.

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ORDER

I **ORDER**, therefore, that the July 9, 1987 decision by respondent Board to accept the valid resignation of petitioner dated May 13, 1987 be, and hereby is, **AFFIRMED.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

April 29, 1988
DATE

JOSEPH LAVERY, ALJ

Receipt Acknowledged:

4-29-88
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

May 4 1988
DATE

OFFICE OF ADMINISTRATIVE LAW

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WILLIAM HANLEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

Relying on his post-hearing submission, which is incorporated herein by reference, petitioner excepts to the determination of the ALJ for the following reasons:

1. The Administrative Law Judge incorrectly determined that there was no requirement that the Respondent Board of Education act on Petitioner's request for a leave of absence.

2. The Administrative Law Judge erred in determining that the Petitioner's letter of May 13, 1987 constituted a resignation by Petitioner from his position of employment effective June 30, 1987. In fact, that letter could not constitute a letter of resignation, as it was not clear, specific, and unambiguous in its terms.

3. The Administrative Law Judge erred in determining that the Respondent properly accepted a resignation of Petitioner's, as any porported (sic) resignation of Petitioner's which was accepted by the Respondent was not accepted strictly upon its terms.

4. The Administrative Law Judge erred in determining that to the extent that Petitioner had submitted a resignation, that resignation had not been modified such that it was to be effective only on such a date as to make Petitioner eligible to receive COBRA benefits. (Exceptions, at p. 1)

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Petitioner seeks reversal of the initial decision, reinstatement to his tenured position and full emoluments of his employment.

Upon a careful and independent review of the record before him, the Commissioner affirms the decision of the Office of Administrative Law for the reasons stated therein. He adds the following.

The record is unequivocal that "[p]etitioner himself concedes in all candor that he intended this letter [of May 13, 1987] to be a resignation." (Initial Decision, ante) (See also Board's Post-hearing Memorandum dated March 1, 1988, at p. 2.) The Commissioner concurs with the ALJ's conclusion that:

> There is no ambiguity in petitioner's May 13 decision. It is a voluntary relinquishment of his position, affording no other conclusion but that, once his obligation to complete the school year terminated, he had no intention to return. Fisher v. BOE, City of East Orange, decided Commr. of Ed. January 11, 1988)
>
> (Initial Decision, ante)

The Commissioner finds that any "misunderstanding" (see P-6) that may have resulted from petitioner's resignation dated May 13, 1987 is of his own making. Notwithstanding a clear statement that he had no intention of returning to the school system in September 1987, petitioner sought to obfuscate that intention by simultaneously requesting a leave of absence. If his intention had been to request a leave and not to resign his position, he should have so stated in clear, unambiguous language without reference to not returning in September 1987 or to the thirteen years of teaching in the Board's employ which he thereafter intended to terminate.

Notwithstanding petitioner's expressed preference for a leave of absence, the Commissioner agrees with the ALJ that this alternative was denied by the district. Thus, petitioner's letter of May 13, 1987 constituted a resignation, which he did not rescind before the Board acted to accept it at its meeting of July 9, 1987. The statute concerning leaves of absence states:

> ARTICLE 2. ADDITIONAL SICK LEAVE OR OTHER LEAVES OF ABSENCE
>
> 18A:30-7. Power of boards of education to pay salaries
>
> Nothing in this chapter shall affect the right of the board of education to fix either by rule or by individual consideration, the payment of salary in cases of absence not constituting sick leave or to grant sick leave over and above the minimum sick leave as defined in this chapter or allowing days to accumulate sick leave as defined

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> in this chapter or allowing days to accumulate over and above those provided for in section 18A:30-2, except that no person shall be allowed to increase his total accumulation by more than 15 days in any one year.

As suggested by the ALJ, "[n]o citation or record of administrative practice suggests that this denial (of petitioner's request for a leave of absence) required approval by respondent Board." (Initial Decision, ante) A board must act only in granting such leave. Further, a denial of a leave may only be reversed by the Board. Petitioner made no such appeal following Ms. Witt's letter dated May 27, 1987 denying petitioner's request for a leave of absence. (P-2) Lest there be any future confusion in this district regarding leaves of absence, the Commissioner hereby directs the Board to establish a policy relative to the role to be played by administrative staff in denying leaves of absence and providing further opportunity for any such denial of leave by administrative staff to be appealed to the Board pursuant to N.J.S.A. 18A:30-7.

Thus, recognizing that petitioner had been denied a leave of absence, the Board, in good faith acted to accept his letter of resignation dated May 13, 1987. At its July 9, 1987 meeting said resignation provided more than adequate 60-day notice that petitioner intended not to return to his duties on September 1987. Even assuming arguendo that the Board did not have before it the May 13, 1987 letter of resignation at the time of its decision, but instead relied on the recommendation of the Superintendent in accepting petitioner's resignation, the mere fact that petitioner did not appear for work in September 1987 absent a grant by the Board of a leave of absence clearly indicated his intention to pursue an alternative career opportunity. Similarly, petitioner's belated submission of a second resignation dated July 24, 1987 (P-6) purportedly to comply with a 60-day notice required by N.J.S.A. 18A:28-8, represents further evidence of his intention of resigning his duties upon learning his request for a leave had been denied. Having tendered a resignation on May 13, 1987 which provided adequate notice of his intent not to return to his teaching duties in September 1987, there was no need for petitioner to submit a second resignation. Moreover, petitioner was a 10-month employee. The Board's timely action accepting his resignation by resolution at its July 9, 1987 Board meeting, effective June 30, 1987, was appropriate, since his employment with the district for the 1986-87 school year ended June 30, 1987.

Accordingly, the Commissioner accepts the recommendation of the Office of Administrative Law dismissing the Petition of Appeal and adopts it as the final decision in this matter for the reasons expressed in the initial decision.

COMMISSIONER OF EDUCATION

June 9, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7080-87
AGENCY DKT. NO. 300-9/87

BERND WALTER AND
ELIZABETH WALTER,
Petitioners,

V.

BOARD OF EDUCATION OF THE
TOWNSHIP OF MONTCLAIR, ,
ESSEX COUNTY,
Respondent.

Bernd Walter and Elizabeth Walter, petitioners pro se

Patti E. Russell, Esq., for respondent
(McCarter and English, attorneys)

Record Closed: March 16, 1988 Decided: April 25, 1988

BEFORE **JAMES A. OSPENSON. ALJ:**

Bernd Walter and Elizabeth Walter, residents and taxpayers of the Township of Montclair, Essex County, were denied their application to the Board of Education of the Township of Montclair for transfer of their daughter to Hillside School under a freedom of

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choice program then in force in the district under policy no. 5117(b), revised February 11, 1985, which entailed racial balance in the schools as one consideration. The application was considered and reconsidered from March 2, 1987 until ultimate denial on August 28, 1987. In a petition of appeal filed in the Bureau of Controversies and Disputes of the Department of Education on September 29, 1987, petitioners alleged the policy was improperly conceived and applied against their interest through parental pressure. They sought judgment requesting the Commissioner of Education to investigate the definition and implementation of the factors and guidelines utilized in the freedom of choice program and directing changes where necessary to provide a fair selection process with reasonable, well-defined standards. They specifically appealed denial of their application in respect of their child. The Board admitted existence of the policy no. 5117, revised February 11, 1985, as of the time petitioners' application was made and denied in August 1987. The Board adopted a revised policy on December 7, 1987. The Board contended the policy in both forms was within its management prerogative and was otherwise consistent with law. It denied petitioners' application was improperly rejected. The Commissioner transmitted the matter to the Office of Administrative Law on October 22, 1987, for hearing and determination as a contested case in accordance with N.J.S.A. 52:14F-1 et seq.

On notice to the parties, a prehearing conference was held in the Office of Administrative Law on January 15, 1988 by telephone and an order entered establishing, inter alia, a hearing date for March 15, 1988. At issue in the matter, as narrowed by stipulation at time of prehearing conference, was whether petitioners shall have proven by a preponderance of the credible evidence that the Board freedom of choice policy in effect at the time of their request and/or whether its application in denial against their interest was arbitrary, capricious, or contrary to law. The matter was heard and concluded in the Office of Administrative Law on March 15, 1988. Thereafter, time for posthearing submissions have elapsed, the record closed.

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EVIDENCE AT HEARING

Petitioners themselves did not testify at hearing; their case was put on documentation introduced into evidence and argument. In opening, petitioners asserted they were not specifically contesting their daughter's denial of application for transfer to Hillside School. Though they felt the denial was unfair to them, they had no general problem with the race/space concept of the then existing policy. They argued, however, that freedom of choice under the policy necessarily implied the choice lay with parents. If space allowed only one of several choices, they felt the policy should be applied by lottery or on a first come - first served basis.

Petitioners offered in evidence a letter of the Commissioner to the Montclair superintendent on June 4, 1976 approving a Montclair desegregation plan; to the letter were annexed resolutions of the Board incorporating the plan on June 1, 1976, November 12, 1979, May 28, 1985 and November 3, 1986. The exhibit was P-1. Exhibits P-2 and P-3 offered by petitioners were affidavits of other parents detailing circumstances of denial of their children's applications for freedom of choice transfers. Also received in evidence were exhibits A to H, as annexed to the petition.

Petitioners rested.

On its case, the Board offered in evidence the current freedom of choice policy adopted December 7, 1987. R-1. The policy defined freedom of choice as "the means by which parents express educational preferences for their children in grades pre-K through 8. Racial balance and space availability govern the placement of students as determined by the administrative staff." Pertinent freedom of choice guidelines under policy no. 5117 were these:

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Implementation Plan

1. In 1974 Montclair's plan of action was modified to provide freedom of choice for parents. A freedom of choice option was added to the State approved desegregation of magnate schools. Freedom of choice is a system by which parents may opt to send their children to another school, provided there is space available and racial balance is not adversely effected.

   (a) Space available is determined by looking at the space available in the requested school and grade. Class size guidelines as established by the Board of Education are a primary consideration.

   (b) Racial balance in both the school and grade from which the student wishes to leave and the school and grade to which is applying to go. Each school in the district should reflect the racial balance in the school system.

2. If there exists more requests that meet the above criteria, the following factors not listed in order of priority, are considered:

   (a) Whether or not a sibling is in the school requested;

   (b) Whether or not the parents' freedom of choice was denied the previous year;

   (c) Supporting data regarding school progress provided by the school (TOT pre-referral procedures, disciplinary reports, report cards, absenteeism, teachers records; etc.);

   (d) Whether or not student was retained;

   (e) Any other data that would help make the best placement for an individual child.

The policy called for a uniform freedom of choice application to be filled out by parents and detailed filing procedures.

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Called by the Board, Mary Lee Fitzgerald, Montclair superintendent for the past six years, testified she employs an assistant to manage the district's freedom of choice policy in particular response to parent applications. These are due by March 1 or April 1, when deadline closes. The assistant responds to allow those applications where criteria of race and space permit. By June 1, the superintendent said, she reviews the remaining applications with the assistant and reviews her proposals. The process continues until August. When parents object to the assistant's rulings, she said, she oversees the application and suggested ruling. Her general policy is that parents are accommodated whenever possible.

Asked how choice is made among those applications that do not meet race and space criteria, she said parents are then asked for more than one choice. Efforts are made to ferret out all information; variables in each case are many. If an application cannot be granted in May, there may be availability by September, since space availability will change over the summer. Effort is made to try to persuade parents to apply for schools where other parents desire transfers out. In order to fit into the Montclair desegregation plan, racial balance is looked to at both the school from which transfer is sought and the school to which transfer is sought. The superintendent believed the considerations she mentioned were implied as secondary considerations in the 1985 Board policy even if not so stated expressly. She felt the Board intended such secondary considerations, not merely the consideration of first-come first-served. Last year, she noted, more questions than usual appeared because a new assistant superintendent took over administration of the policy. From those questions she learned procedures had to be formalized. Thus was born the amended policy adopted by the Board in December 1987. Referring to her letter to petitioners on July 2, 1987 (petitioners' exhibit D), she noted the six criteria in that letter were those in use in the district for the previous several years and had been consistently so applied. Those six criteria ultimately were adopted in the December 1987 policy explicitly.

The superintendent noted she would not support any policy designed on a first - come first - served basis or on a lottery basis.

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The superintendent testified the former policy of February 11, 1985 (petitioners' exhibit A) did not preclude the secondary criteria of present policy. She pointed to I (2)(b), (c) of the 1985 policy as importing implied power to invoke secondary criteria:

> (b) Choices could not create or aggravate racial imbalance in any school or in any grade in any school (that is, in either the assigned school or the school of choice). A school would be considered racially balanced if it is not less than 25 percent nor more than 45 percent black in grades 2-4 taken as a whole; a grade level in a school would be considered racially balanced if it is not less than 25 percent nor more than 50 percent black.
>
> (c) Choices could not create or aggravate overcrowding in any school.

DISCUSSION

Petitioners argued generally that the 1985 policy on its face imported parents choice, not the superintendent's choice. Since there was no discretion then and since the Board utilized other criteria, the policy was arbitrary. The old form of freedom of choice application (exhibit B) also, said petitioners, did not disclose any secondary criteria and therefore invited an arbitrary selection process. Affidavits in P-2 and P-3, they argued, showed that while parents had supporting documentation, they were nevertheless rejected out of hand. Specifically, petitioners sought the following relief: judgment invalidating the 1987 policy and reinstitution of the 1985 policy with "defined implementation policies" for parental selection by choice, by earliest application or by lottery.

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In posthearing submission, petitioners summarized their claim:

> We urge the OAL to instruct the New Jersey Commissioner of Education to order the Montclair Board of Education to rescind their current arbitrary, capricious and contrary to law criteria for the freedom of choice policy and implement equal and fair standards instead.

In its posthearing submission, the Board urged its 1985 policy was rendered moot by adoption of a new freedom of choice policy on December 7, 1987, which formalized earlier related criteria and which was well within, it said, policy-making discretion of the Board under N.J.S.A. 18A:11-1 and exhibit R-1. The 1987 policy removed any perceived ambiguity in the 1985 policy; the clarified criteria were rational and reasonably related to appropriate educational obligations of the Board; and petitioners' suggestion the policy or its criteria was arbitrary was without basis.

As a generality, it is clear that boards of education have authority under N.J.S.A. 18A:11-1 to establish policies like those at issue here and that the authority to enact rules and regulations embraces the power to administer them. The Commissioner will not substitute his judgment for that of a board of education in such matters when a board has acted in good faith, free from arbitrariness or unreasonableness. Appellate decisional authority has restated the notion that the Commissioner, in determining controversies under school laws, may inquire into the reasonableness of the adoption of policies but will not invalidate them unless unreasonableness appears. See Siegfried v. Bd. of Ed. Borough of Shrewsbury, 1976 S.L.D. 2, at 5. It has also been implied, in appropriate cases, that the Commissioner's power to review board policies is not without limitation if reasonableness has been found: ultimately, it has been said, boards of education are responsible not to the Commissioner but to their constituents for the wisdom of their actions. See Popovich v. Bd. of Ed. Borough of Wharton, 1977 S.L.D. 440, 444. One implication of the generality, perhaps, is that petitioners' claims here may be more

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appropriate in the political process through which the Board legislates than in this, an adjudicatory mode before the Commissioner under his disputes resolution jurisdiction of N.J.S.A. 18A:6-9.

My impression from all of the documentary evidence in the record, and in particular the 1985 and 1987 freedom of choice policies (exhibit A and R-1), suggests the two are clearly policy efforts to avoid de facto segregation in the district. The term "freedom of choice" for parents to select particular schools for their children must necessarily not be unlimited, if unlimited choice could lead to furtherance of de facto segregation. Constitutional and statutory obligations of the Board prohibit that result. Cf. N.J.S.A. 18A:38-5.1; N.J.A.C. 6:8-4.3(a)(9); and see Morean v. Bd. of Ed. of Monclair, 42 N.J. 237, 241-44 (1964); and Booker v. Bd. of Ed., City of Plainfield, 45 N.J. 161, 178 (1965). The Board received recent approval from the Office of Equal Educational Opportunity of the New Jersey Department of Education for its desegregation plan, as of February 6, 1987, subsequent to adoption of the 1987 freedom of choice plan. R-2.

In their petition, petitioners seem to have urged that racial guideline issues ought not to be considered in the freedom of choice they feel the Board gave them in the 1985 policy. But I do not take it their impression of the 1985 policy is at all accurate. It does indeed say parents would be "free to choose an elementary school other than one assigned under the basic pupil assignment pattern," but it expressly imposes limitations restricting untrammeled choice: that is, choices are not free, if they would tend to create or aggravate racial imbalance in any school or in any grade. See par. I (2) of exhibit A.

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It seems self-evident that untrammeled parental choice would risk failure to extinguish racial segregation in the district. In any event, however, both from clear language of the 1985 policy, which expressly imposes qualifications on parental freedom of choice, and from testimony of the superintendent, the policy as applied within the district by merit of use of "secondary considerations," can be readily seen, given the district's underlying obligation to extinguish segregation, to survive any conclusory challenge of unreasonableness. It is my view that not only does the 1985 policy necessarily permit interpretation and application such as that testified to by the superintendent, but that interpretation administratively is in no way an unreasonable or arbitrary arrogation of administrative power not expressly granted.

As argued by the Board ultimately, therefore, I **CONCLUDE** as follows:

1. The 1985 freedom of choice policy, though rendered moot in these circumstances since petitioners no longer claim particular application of the 1985 policy in their case was wrong, was superceded by a clarifying policy by the Board on December 7, 1987;

2. Either form of policy lay within the Board's managerial power to promulgate under N.J.S.A. 18A:11-1, lay within the Board's obligation not to exclude children from any public school on account of race, creed, color, national origin or ancestry under N.J.S.A. 18A:38-5.1, and lay within its obligation, moreover, to take affirmative steps for such equal educational opportunity under N.J.A.C. 6:8-4.3(2)(9);

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3. The 1985 policy was not designed to give parents, nor did it give parents, untrammeled or unlimited freedom of choice to select district schools for their children free of the Board's proper concern for equal educational opportunity and its duty to undertake affirmative action to secure it;

3. There is no competent evidence in the record to permit or require the inference the Board in its application of policy under either version was arbitrary, capricious or unreasonable; and

4. The petition of appeal in this matter, therefore, in view of the above, should be, and is hereby, **DISMISSED.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN** , who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

April 25, 1988
DATE

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

4-28-88
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

APR 28 1988
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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BERND WALTER AND ELIZABETH WALTER,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTCLAIR, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

Upon his careful and independent review of the record of this matter, the Commissioner agrees with the findings and the conclusion of the Office of Administrative Law that there is no competent evidence in the record to permit or require the inference that the Board, in its application of policy no. 5117, under either version, was arbitrary, capricious or unreasonable.

Accordingly, the Commissioner accepts the recommendation of the Office of Administrative Law dismissing the Petition of Appeal and adopts it as the final decision in this matter for the reasons expressed in the initial decision.

COMMISSIONER OF EDUCATION

June 9, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2596-88
AGENCY DKT. NO. 58-4/88

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE BOROUGH OF PARK RIDGE, BERGEN COUNTY,

---

George J. Apfel, petitioner, pro se

Irving C. Evers, Esq., for respondent Park Ridge Board of Education (Giblin and Giblin, attorneys)

Record Closed: April 20, 1988 Decided: April 27, 1988

BEFORE **JAMES A. OSPENSON,. ALJ:**

George J. Apfel, a defeated candidate for school board membership in the annual school election held in the Borough of Park Ridge, Bergen County, on April 5, 1988, alleged there were procedural violations of the school election law committed during conduct of the election. By letter complaint filed with the Commissioner of the Department of Education on April 8, 1988, he sought inquiry into violations of statutorially prescribed procedures, presumably under N.J.S.A. 18A:14-63.12 and N.J.A.C. 6:24-6.1(d).[1] Inquiry by the Commissioner into such alleged violations, under N.J.S.A.

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1 Petitioner's request to the Commissioner did not entail a request for recount of ballots under N.J.S.A. 18A:14-63.1 et seq. and N.J.A.C. 6:24-6.1(a). If such a request had been made, it would be beyond the scope of present proceedings.

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18A:14-63.12, is to determine (1) if such violations occurred and (2) if they affected outcome of the election. Petitioner stipulated at hearing on April 20, 1988, however, that he did not seek invalidation of election results; he conceded he was low vote-getter on a slate of four candidates for two Board positions. See J-4.

The matter was transmitted by the Commissioner to the Office of Administrative Law on April 13, 1988 for hearing and determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. On short notice to the parties, because of time strictures occasioned by statutory notice periods for new elections should they become necessary, a hearing on the inquiry was conducted and concluded in the Office of Administrative Law sitting in the Municipal Court of the Borough of Park Ridge on April 20, 1988. Petitioner's letter complaint alleged (1) a violation of N.J.S.A. 18A:14-4a in that there were no American flags posted outside entrances of any of the three polling places and (2) that there were only three active poll workers working at any of the three polling places. The letter complaint alleged that the Board had entered into an agreement with petitioner and others in 1987 school Board election matter, and its settlement before an administrative law judge under OAL Dkt. No. EDU 2589-87.[2] I shall take official notice of that proceeding and the judgment therein, pursuant to N.J.A.C. 1:1-15.2.

GENERAL FACTS

The parties stipulated, and I so **FIND**, the Borough of Park Ridge is a type II school district covering grades K-12 in three schools. Its Board of Education has seven members; in the April 5, 1988 school Board election two seats were to be filled, each for

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2 The settlement acknowledged failure to comply with all requirements of N.J.S.A. 18:14-48 (keeping of poll lists); the Board agreed to comply therewith thereafter. Outcome of the 1987 election was not affected.

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a three year term. Machine ballots contained the names of four candidates, one of whom, Robin McGregor, was an incumbent seeking reelection. According to a certification by the Board secretary on April 6, 1988, incumbent candidate McGregor and Neil Giovanniello were elected. Petitioner was last among the four candidates. The current expense school budget for 1988-89 was approved by the voters. See J-4. The Borough is divided for election purposes into six electoral districts that voted at three polling places: districts I and IV at Eastbrook School K-6; districts II and V at Park Ridge High School 7-12; and districts III and VI at West Ridge School K-6.

EVIDENCE AT HEARING

Called by petitioner under subpoena, Yetta Sturm testified she was a Board worker at the Eastbrook School polling place for districts I and IV as judge of elections, having been so appointed by the Board on February 22, 1988. See J-1. She said there was an American flag displayed in the joint polling place, which was the multi-purpose room of the school. There were four election workers there: herself as judge of elections, Doris White as inspector, and Lucia Valez and Carol Boccino as tellers or clerks. The polls were open from 2:00 p.m. to 9:00 p.m. She was present in the polling place from about 1:00 p.m. to 9:30 p.m., as were the other election workers. Inspector White kept a list of voters and their addresses as they came in until about the middle of the afternoon, when she was advised to cease the practice. As a practice, Sturm said, that had always been done; no one had ever before questioned the practice.

Called by petitioner under subpoena, Richard McManus, Board secretary, testified as to identities of the election workers in districts I and IV, as had Sturm. For districts II and V, Mary Collins was judge of elections, Jean Kosel was inspector of elections, Jean Hulst and Bert Collins were tellers or clerks. For districts III and VI, he said, Justine Shifris was judge of elections, Doris Andrews was inspector of elections, and

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Jane Hespe and Elaine Mooney were tellers or clerks. Concerning the appointment of Burt Collins as teller/clerk in the polling place for districts II and V, McManus said the person originally appointed, Hazel Obutelewicz, told him about a week before the elections she would be unable to serve. McManus appointed Burt Collins in her place on suggestion of one of his office staff. Collins, McManus said, attended classes on March 30, 1988 held by the Business Administrators Association at Fair Lawn High School, conducted there by an officer of the County Board of Elections, and covering election duties and procedures. An official certification of completion of the course was given to Collins. Thus, McManus felt, there was compliance with the statutory obligations of N.J.S.A. 18A:14-6.1. He admitted the Board never officially appointed Collins by roll call resolution. That the Board did not, he said, was an oversight on his part for not having included the matter on the Board's agenda for the last meeting shortly before election.

McManus said he was present in the polling place for districts I and IV and saw Inspector White recording names and addresses of voters on a pad as they voted. He said the practice was of twenty years standing, the results being kept in a file in his office for convenience of candidates and workers and available to the public generally. At about 2:00 p.m. on election day, McManus said, petitioner complained to him that such a list was being kept. McManus called the Board attorney for advice. As a result of his call, he suggested to judges of elections in two of the polling places that the practice be discontinued and the lists destroyed. That was done, he said. For the third district he relayed his recommendation to a school principal with instructions to relay the recommendation to the judge of elections. Petitioner had complained to him there was a tie-up at the polling place for districts II and V because the taking of names and addresses took too much time.

McManus said that contrary to petitioner's complaint about American flags, there were three foot by five foot American flags on flagpoles located near the outside entrance to each of the three polling places, albeit the flags themselves were inside

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common doors to the polling places, each of which served two electoral districts. In addition, he said, there were notices of election posted on the buildings near the street for the information of the voting public. He recalled the subject of no American flags being posted was a subject of petitioner's letter complaint after the 1987 school election. As a result of an agreement reached at the time between petitioner and the Board, he said, he caused American flags of proper dimension to be placed next to the outside entrances of the three polling places. McManus drew sketches of the three polling places showing placement and positioning of the flags; the sketches were R-1 and R-2 in evidence.

Petitioner's case was completed on the above testimonial and documentary evidence. The Board moved at that time for judgment of dismissal of the letter complaint on the ground that no statutory violations appeared and indicated no further witnesses would be called.

DISCUSSION

I

N.J.S.A. 18A:14-4a provides:

> A United States flag, approximately three feet by five feet in size, shall be displayed at the outside entrance of each polling place during the hours of the conduct of an annual or special school election; except that, when more than one polling place is located in the same building the prominent display of one such flag at the outside entrance used in common to reach more than one polling shall comply with the provisions of this Act. . . .

From the testimony and from the sketches R-1 and R-2 in evidence, I **FIND** and **DETERMINE** that the positioning and placement of the American flag, as located by "X" on the sketches, demonstrated that the flags positioned were "at the outside entrances

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used in common to reach" the three dual polling places for the six electoral districts. The statutory requirement does not specify the flags be outside the building at the exterior door to polling places. They may be positioned physically inside the buildings housing the polling places provided only that they be "at the outside entrance." Thus, and I so **FIND**, there was no literal or actual statutory violation.

II

N.J.S.A. 18A:14-6 provides generally that at its last regular meeting not less than forty days before the annual school election, a board of education shall appoint a judge of elections, an inspector of elections and two clerks of elections for each polling district therein. Although the evidence here has demonstrated the Board so acted, the evidence showed that through an oversight it was unable to act officially to appoint a substitute for teller/clerk. The person named by the Board secretary, however, had attended election procedure classes and became certified, as he would have been required to do had he been formally appointed by the Board, under N.J.S.A. 18A:14-6.1. The result is the substitute served de facto, in literal but inconsequential deviation from statute. The Board and its Board secretary are **ADMONISHED** carefully to ensure in future that appointments of election officials or their substitutes be carefully processed procedurally in conformity with statute. The technical irregularity here, needless to say, did not affect outcome of the election, within the meaning of N.J.S.A. 18A:14-63.12.

III

I **FIND** and **DETERMINE** that the practice of an election official, in this case an inspector of elections in recording informally for any purpose whatsoever, the names and addresses of voters as they voted in the polling places was a practice not expressly

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required or allowed under school election law. For whatever its purpose in this case on April 5, 1988, or in years past, the practice should not have occurred and should in future be discontinued. The time and attention of election workers should be reserved for and confined to express official duties; the Board is so **ADMONISHED.**

IV

Lastly, I have considered in the above the present allegations by petitioner in comparison to those made in prior litigation in 1987. The only commonality in allegations in the two years was that concerning the non-display or alleged improper display of the American flag in violation of N.J.S.A. 18A:14-4a. I **FIND** the Board has met its obligations of conformity in respect thereof by the positioning and placement of the flag for the April 5, 1988 election, as well as do I **FIND** that the Board was careful to recognize continuing obligations under settlement of prior litigation.

CONCLUSION

Under all circumstances, and in view of the fact petitioner has not sought or established a basis for invalidation of the April 5, 1988 election, I **CONCLUDE** his letter complaint should be, and it is hereby, **DISMISSED**, subject, nevertheless, to admonitions set forth above.

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This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN** , who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

April 27, 1988
DATE

James A. Ospenson
JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

5-2-88
DATE

Seymour Wells
DEPARTMENT OF EDUCATION

Mailed To Parties:

MAY 2 1988
DATE

Donald J. Lumbo, Jr.
FOR OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH OF	:	DECISION
PARK RIDGE, BERGEN COUNTY.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

Upon a careful and independent review of the record of this matter, the Commissioner agrees with the findings and the conclusion of the Office of Administrative Law that, in view of the fact petitioner has not sought or established a basis for invalidation of the April 5, 1988 election, and, subject to the admonitions set forth in the initial decision, the instant letter of complaint should be dismissed with prejudice. The Commissioner adopts the initial decision in this matter for the reasons expressed therein.

COMMISSIONER OF EDUCATION

June 10, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4442-87
AGENCY DKT. NO. 167-5/87

BOARD OF EDUCATION OF THE TOWNSHIP OF LACEY,
Petitioner,
v.
MAYOR AND COMMITTEE OF THE TOWNSHIP OF LACEY,
Respondents.

Arthur Stein, Esq., for petitioner (Curry, Stein & Bennardo, attorneys)

Terry F. Brady, Esq., for respondents (Gilmore & Monahan, attorneys)

Record Closed: March 31, 1988 Decided: April 28, 1988

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

The Lacey Township Board of Education (Board) appeals the action of the Township of Lacey (Township) by which the Township certified to the Ocean County Board of Taxation a lesser appropriation for current expense school budget purposes for the 1987-88 school year than the amounts proposed by the Board in its budget that was rejected by the voters on April 7, 1987.

The matter was transmitted by the Department of Education to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. After notice, a prehearing conference was held on August 20, 1987. It was determined that the issue is whether the budget certified by the Township is adequate to provide a thorough and efficient system of schools in the district as required by N.J.S.A. 18A:22-37.

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The original petition of appeal recited the defeat of the budget at the polls; meetings between the Board and Township on April 16 and 24, 1987; the Township's notice to the Board of the Township's resolution of April 28, 1987, reducing the budget by $1,878,000; the Board's offer to reduce the budget by $1,041,000; the Township's rejection of the offer, and the Township's insistence on a reduction of $1,878,000.

On September 9, 1987, the Board submitted an amended petition that eliminates reference to negotiations between the Board and Township and further recites the Board's action on May 4, 1987, approving a motion to appeal the reduction. In both petitions, the Board asserts that a thorough and efficient education cannot be provided for each student in the district if the budget reduction is upheld. The Township generally denies the allegations and submits that it has complied with its statutory obligation to review and determine the amount to be raised by taxation for the 1987-88 school year. The Township appended an analysis of its reductions, setting forth areas and amounts of reductions as well as the justification for each.

The parties complied with prehearing discovery rules, including the filing of written testimony. N.J.A.C. 1:6-10.1.

The matter was heard on November 12, December 8 and 15, 1987, and February 24, 1988. The parties timely filed posthearing submissions.

FACTUAL BACKGROUND

The budget proposed to the voters on April 7, 1987, required $10,505,198 to be raised by tax levy for current expense purposes for the 1987-88 school year. Upon defeat of the budget, the Board delivered the proposed budget to the Township pursuant to N.J.S.A. 18A:22-37. Pursuant to the same statute, the Township certified $6,610,609 to the Ocean County Board of Taxation on April 27, 1987. The Township also transferred $2,016,589 to the Board for use in the 1987-88 year. The amount certified to the county board of taxation and the donation total $8,627,198. This seems to leave $1,878,000 in dispute between the two bodies. However, the Township made $1,720,600 in line item reductions and adjusted revenues upward by $500,000, a total change of $2,220,000. This decision treats the line items in full. In consideration of the annual audit (P-2), the proposed revenue adjustments are unrealistic and must be set aside. The total under examination, therefore, is $1,720,600.

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PRELIMINARY MATTERS

The Township asserts this hearing is limited to a review for "procedural or substantive arbitrariness" on its part and the Board must show the Township's "decisions concerning the school budget were without any reasonable foundation and that those decisions have the effect of depriving the students in the district of even minimal standards of a thorough and efficient education" (posthearing submission at 4). The Township relies primarily on East Brunswick Bd. of Ed. v. Tp. of East Brunswick, 91 N.J. Super. 20 (App. Div. 1966), aff'd 48 N.J. 94 (1966) and related cases, particularly Branchburg Bd. of Ed. v. Branchburg, 187 N.J. Super. 541 (App. Div. 1983).

The Township's reading of the cases is correct, but incomplete. According to the instruction of the Supreme Court, the Commisioner (and, hence, this tribunal) does not sit as an original budget-making body. The function is to sit as a reviewing body which, however, is charged with the responsibility to see to it that a thorough and efficient system of free public schools operates in each district. The responsibility goes beyond a mere determination of whether the governing body's reductions were arbitrary and capricious. The responsibility extends to making an independent determination, giving due weight to the findings of the governing body.

The Court made clear in East Brunswick that:

> ...[T]he Commissioner in deciding the budget dispute before him, will be called upon to determine not only the strict issue of arbitrariness but also whether the State's educational policies are being properly fulfilled. Thus, 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" ... 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..., then he will sustain it, absent any independent showing of procedural or substantive arbitrariness. [Citation omitted.]

48 N.J. at 107. This opinion proceeds on that basis.

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On November 12, I ruled inadmissible a transcript of the April 24, 1987 meeting between the Board and the Township held pursuant to N.J.S.A. 18A:22-37 (R-7). The Township took the question to the Commissioner of Education interlocutorily. On December 8, the Commissioner ruled that:

> ...[T]he Committee must be permitted to set forth in evidence the full and entire basis for its decision making with respect to the defeated budget. It will then be up to the ALJ and the Commissioner to determine what weight should be accorded to that evidence given the totality of the circumstances of the situation. [Id. at p. 6.]

Having now had the advantage of reading the transcript of that meeting, it appears that both sides were shooting in the dark. The Board believed it would have at least $440,000 more than it did in surplus at the end of the school year. The Board's argument that an unsettled budget is a distabilizing factor in a district's operations is a compelling argument. It comports with common sense and experience and explains why even an exteme position might be put forward in an attempt to bring about quick resolution.

The Township, while trying to reduce the tax levy as much as possible, also tried to determine what the Board's needs were in each account. The exchanges on April 24 appear to have been frank although often inconclusive. It is apparent that the Township relied, at least in part, on the Board's representation that the maximum reduction the Board could sustain was $1,041,000 (R-7). It also is clear that the Township made changes in the budget totalling $2,220,000.

Anticipated income and surplus figures are reviewable by the governing body and may be adjusted if underbudgeted. Branchburg Bd. of Ed. v. Branchburg Tp., 187 N.J. Super. 540 (App. Div. 1983), certif. den. 94 N.J. 506 (1983). Yet little time was spent and no conclusions expressed on these subjects at the April 24 meeting. Notwithstanding all of this, the Township's resolution of April 28 imposing a $1,878,000 reduction had to come as an unpleasant surprise. In short, any reliance either party had on the other ceased to be viable.

The Township argues that the Board's mention of $1,041,000 at the meeting, combined with my comment on it during hearing, is binding — in effect, the law of the

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case. The facts just recited indicate otherwise. However, even if the question is treated as a legal rather than a fact question, the law of the case contention is inappropriate. The law of the case doctrine "is merely a non-binding decisional guide." State v. Hale, 127 N.J. Super. 407, 411 (App. Div. 1974).

Finally, the Board made numerous transfers of funds between accounts in the 1986-87 budget, mainly because of unforeseeable pressures. While the transfers seem necessary, there are some unwholesome results. One is that comparisons of accounts between years becomes difficult. If moneys allocated to buy X were diverted to Y in 1986-87, an allocation to buy X in 1987-88 can seem duplicative or may be taken to mean that X was not necessary in 1986-87. The Township has drawn each type of conclusion at various times in its analysis of the budget and although those conclusions may have proven wrong, they were not unreasonable conclusions based on the information the Township had.

RELEVANT TESTIMONY AND FINDINGS

There was prefiled and in-person testimony of the assistant superintendent of schools, the school auditor and the Township's registered municipal accountant. The assistant superintendent was acting superintendent during budget preparation. In addition, the board secretary testified briefly at the conclusion of hearing.

Revenues

Although earlier estimates varied, the free balance as of June 30, 1987, was $343,775.29, representing about 3.3 percent of the current expense budget submitted to the voters (P-2, Schedule A-3a).

The assistant superintendent testified concerning a series of expenditures from the free balance made after July 1 (P-1, R-4). He believes these payments represent obligations incurred but not paid before June 30. Miscellaneous revenues have been fairly steady over the last few years, but cannot be counted on. Unanticipated transfers from free balance in 1986-87 totaled $425,000.

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The Township counters that reference to the district's accounts, administrative records, salary calculations, audits and pupil projections led to its recommendation to reduce the amount raised by tax levy by increasing revenues. The Township's witness points out that the Department of Education has ruled that a transfer of $362,003.36 in a prior year from the current expense account to the capital outlay account was not legal and that the funds must be returned to the current expense account in last year's budget. Therefore, the balance of $362,003.36 should be added to the total surplus being carried into this year's budget. The Board's anticipation of no miscellaneous revenues is unreasonable. It may anticipate miscellaneous revenues from interest income, tuition income and various other receipts. Certified audits show that miscellaneous revenues ranging from $107,000 to $287,000 have been received in the last five budget years. The Township estimates the true surplus as of June 30, 1987, to have been $1,184,475.70. The Township maintains that "only" $500,000 of this projected surplus comes from revenues other than taxation that the Board should show. Further, the Township has already committed to donate $2,016,589 to the Board for the 1987-88 year.

In short, the Township urges that revenues can be increased by as much as $700,000 from the projected surplus and by $150,000 to $247,000 by anticipating miscellaneous revenues.

I **FIND** that the current expense free balance as of June 30, 1987 was $343,775.29. I am convinced from the testimony that this is not an unreasonable amount of surplus to carry in a budget of this size.[1]

I also **FIND** that the Board has failed to estimate miscellaneous income fully. Notwithstanding that this is a difficult item to estimate and that it may be prudent to estimate miscellaneous income on the low side, the Board's experience over the last five years indicates that it may and should anticipate approximately $200,000 per year in miscellaneous revenues. To ignore this line item is contrary to recognized principles of recordkeeping. The Chart of Accounts promulgated by the Department of Education

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[1] See, Board of Education of the City of Perth Amboy v. Council of the City of Perth Amboy, OAL DKT. EDU 3856-87 (Oct. 20, 1987), adopted, Comm'r of Ed. (Dec. 2, 1987). See also, N.J.S.A. 18A:7A-25 and N.J.A.C. 6:20-2.14, which permit a school district to exempt 3 percent of its total current expense budget when requesting a budget cap waiver.

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provides a line item for reporting revenues from local sources. The Lacey Board of Education is **DIRECTED** henceforth to report its best estimates of all revenue from local sources.

Expenditures

The Board attempted to argue for restorations to some accounts that would exceed the reductions made by the Township. Conversely, the Township attempted to argue for greater reductions in some accounts than it made in its April 28, 1988 resolution. Neither argument was allowed because neither has any support in law. The only proper reference points are the budget submitted to the voters and the adjustments made by the governing body, by resolution, pursuant to N.J.S.A. 18A:22-37.

The Township reduced Account 110, administration-salaries, by $7,400. I **FIND** that this amount must be restored.

The parol and documentary evidence amply support a total allocation of $325,000 to this account. Full staffing and a 10.5 percent salary increase along with burgeoning duties justify the complete allocation.

Account 120 deals with contracted services. The Township reduced the account by $135,000. I **FIND** that the Board must negotiate several new labor agreements this year and presently is involved in five litigations. I further **FIND** that the Board's space needs and proposed construction require architectural services. I **FIND** that the Board has demonstrated the need for these consultant services and **DIRECT** that $135,000 be restored to this account.

The Township reduced Account 211, salaries for principals, by $75,000. That figure represents two vice principal positions and represents the difference between 8 percent and 10 percent salary raises for this category. I **FIND** the need for the vice principal positions is established in the record. I **FIND** particularly persuasive the recommendation of the Ocean County Superintendent of Schools of May 4, 1987, that the two positions are essential to proper function of the schools and delivery of a thorough and efficient education.

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I also **FIND** that although the Township views raises to this category of personnel to be excessive, the negotiated labor agreements require an 8.7 percent increase for 1987-88 as well as certain salary adjustments based on completion of graduate course work. Accordingly, I **DIRECT** that $75,000 be restored to this account.

The Township reduced Account 212, supervisors' salaries, by $56,000. I **FIND** that enrollment increases have increased the supervisors' work. In April 1987, the Board reduced three supervisor positions in an economy move. On May 4, the acting superintendent explained the need for supervisors and recommended they be rehired. The Board did so. This action was consistent with a recommendation of the county superintendent.

The agreement between the Board and the administrators and supervisors reflects an 8.7 percent salary increase for the current budget year. Even if the full amount is restored to this account, it will still fall short by approximately $4,580. The Township presented testimony on this line item. However, the witness did not know what work these supervisors perform and did not contact the county superintendent or the acting superintendent to determine those duties.

I **FIND** these positions essential to a thorough and efficient system of education in the district. I **ORDER** the sum of $56,000 restored to this account.

The treatment of Account 213 is similar to that of Account 212. In short, having considered the parol and documentary evidence, I **FIND** that every position represented by the Township's $123,000 reduction is necessary to the delivery of a thorough and efficient system of public education in the district.

Increasing enrollments will press this account even with full restoration of the amount reduced. I **DIRECT** that $123,000 be restored to Account 213, teachers' salaries.

At hearing, the question arose whether the Board made Account 213 payments for the 1986-87 school year out of 1987-88 school funds. I am satisfied from the testimony of the acting superintendent that this is not the case.

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Account 214 was reduced by $37,000. This account deals with instructional salaries for personnel other than teachers. The most important component is child study teams.

The Board has approved a three-year plan for special education that requires the addition of a social worker at the middle school, a social worker at the high school and a learning consultant for the elementary school. Because of an increased need for elementary guidance in elementary classes exceeding 30 pupils, the Board also added a guidance counselor. Even if all funds are restored to this account, the Board will be hard-pressed to meet the district's needs in this area.

This account also addresses a media specialist to handle audio-visual aid materials and equipment, freeing the librarian to perform regular library services. The acting superintendent testified that the media specialist and social worker have not yet been hired because the Board does not have the money to pay their salaries. For the foregoing reasons, I FIND it essential that the entire reduction of $37,000 be restored to this account and so DIRECT.

The Township reduced Account 215, clerical salaries, by $26,000. The Township in its resolution stated its justification as:

> The Board originally put in 10 percent raises settled for eight percent. This amount we have projected is based upon information provided by Board.

A memorandum of agreement signed by the Lacey Township Education Association and the Board projects a 10.5 percent increase for secretaries and not an 8 percent increase as suggested by the Township. Without the addition of needed personnel, the Board projects expenditures of $350,950 in this account.

There are presently 27 secretaries. Based on experience, there will be a need for substitute coverage as well as part-time assistance. In addition, there is a need for secretarial assistance in the elementary school because of the addition of nontenured staff and a guidance counselor. There is also need for an additional student personnel services (guidance) secretary in the high school because of increased enrollment. The

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acting superintendent stated that the use of per diem substitutes for secretaries is not a satisfactory alternative.

Even if the Township's supporting reasons were satisfactory, I **FIND** the Board's support for restoration more compelling. I **DIRECT** that $26,000 be restored to Account 215.

Account 230 deals with school library and audio-visual materials. The Township reduced this account by $11,000.

The prefiled testimony establishes that the middle school and high school libraries have consistently lagged behind New Jersey State Department of Education recommendations. The Board devised a five-year plan to provide adequate libraries at both schools. This program began in 1980 in the middle school and in 1981 in the high school.

The Board states that it cannot reduce its commitment to this account as long as it fails to come up to State recommended minimums. I **FIND** it essential that the Board continue its library improvement program. While it is unfortunate that exigencies have prevented the Board from meeting its goals within the five years it set for itself, full funding of this account will at least prevent a greater gap from the ultimate goal. I **DIRECT** that $11,000 be restored to Account 230.

The Board anticipated an increase of 80 additional pupils and normal economic increases when it budgeted $447,000 to Account 240, instruction-teaching supplies. Considering the expenditure in 1986-87 at $401,868, the $447,000 figure is justified. However, the Township reduced this account by $36,000.

The acting superintendent testified that the Board had reduced the account by $50,000 during the budget building process in order to bring the budget under cap.

I cannot look behind the budget the Board presented to the voters. However, I **FIND** the originally budgeted amount to be justified. I **DIRECT** that $36,000 be restored to Account 240.

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Account 250, instruction-other expenses, was reduced by $105,000. The acting superintendent testified that the amount budgeted, $252,567, represented a decrease of more than $95,000 from the total requests made by building principals. This line item addresses summer curriculum workshops. The acting superintendent testified that austerity had precluded those workshops in the prior budget year. It was his opinion that a thorough and efficient education requires the Board to regularly review and evaluate curriculum to keep it current and to ensure the best types of instruction to students.

The Board has a formal five-year curriculum development plan which is intended to be ongoing. Although the Township testified that it was not its intention to eliminate these workshops, it appears that the reduction made in this account would have that effect.

I **FIND** that these monies are necessary to a thorough and efficient education in the district. I **DIRECT** that $105,000 be restored to Account 250.

Account 410 contains salaries for health services personnel. The Township reduced the budgeted amount by $16,000. The acting superintendent testified that this represents a health aide position. In consideration of rising enrollments, I **FIND** the aide position to be necessary and **DIRECT** that $16,000 be restored to Account 410.

The Township reduced Account 420, other expenses-health, by $1,000. The Board does not contest this reduction.

The Township reduced Account 510, transportation-salaries, by $60,000. The rationale for this reduction is that one driver position and one-half mechanic position can safely be eliminated. The Township further believes this item is overappropriated by $108,713. The Township's figure of $546,600 still provides the Board with a 5 percent cushion over and above actual anticipated expenses.

The acting superintendent testified that a memorandum of agreement between the union and the Board requires a 10.5 percent increase for drivers. During budget preparation, the need for an additional one-half mechanic was considered. When this matter was heard, the assistant superintendent testified the current need is for a full-

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time mechanic at $18,000 per year. Further, the Board must add additional drivers, one driver for a nine-passenger bus and four drivers for standard buses.

The Township did not evaluate bus routes or analyze mechanics' workloads. It also appears that the premises on which the Township's reduction is based are, at least in part, inaccurate. Having considered all the circumstances, I **FIND** and **DIRECT** that $60,000 must be restored to Account 510.

Account 520 deals with contracted services and public carriers for transportation. The largest single item here is the transportation of special education pupils. Transportation of special education pupils to out-of-district placements is particularly expensive.

The Township suggests that the Board spent only $100,016 for this account in the prior budget year. An appropriation of $110,500 as suggested by the Township still gives the Board 10 percent more than was spent last year.

I **FIND** the Township's reasoning to be quite good. However, I also **FIND** that an increase in the number of special education pupils will likely cause this account to be overexpended in 1987-88 even with restoration of the amount reduced. I **DIRECT** that $20,000 be restored to Account 520. I further **DIRECT** the Board to consult with the County superintendent of schools for any technical assistance his office may be able to provide concerning the most efficient and effective use of out-of-district transportation, including the possibility of sharing such transportation with neighboring districts.

Account 530, replacement of vehicles, was budgeted at $120,000 and reduced to $60,000. In prefiled testimony, the acting superintendent stated that 13 buses were purchased in 1980 when the middle school opened. It is essential to purchase buses on a sequential basis, thereby eliminating the impact of having to buy many buses in any one year. In 1992, 13 buses will be 12 years old and must be retired under State regulations. The testimony also states that total pupil mileage has quadrupled in the last seven years.

The district has 36 regular buses, two of which are new, and five smaller buses including three with wheelchair facilities. The average mileage on the 13 buses purchased in 1980 is 77,980. Two of the Board's vehicles have well in excess of 100,000. Five other

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vehicles have in excess of 80,000. The Board's experience is that maintenance costs for older vehicles are significantly higher than for newer vehicles. Replacement of two vehicles at this time is simply good planning. If buses are not replaced on a sequential basis, mandatory replacement will create a true fiscal crisis in 1992 and the cost per bus will probably be higher.

Although some State aid may be sacrificed by early retirement, orderly replacement of these vehicles — carefully spread out over four years — is in the best interests of pupils and taxpayers alike provided the Board adheres to the plan.

I **FIND** the budgeted amount reasonable and **DIRECT** that $60,000 be restored to Account 530.

The Township reduced Account 535, purchase of new vehicles, by $20,000. The testimony supports the Township's argument that one nine-passenger vehicle can safely be cut from this account at a cost of $20,000 because this vehicle was purchased from last year's appropriation.

Accordingly, I **DETERMINE** that the Board has not shown restoration of the $20,000 reduction to be necessary and further **DETERMINE** that the reduction shall stand.

Account 540 deals with transportation insurance. The Board budgeted $60,000; the Township reduced the amount by $1,000, although the Township's justification as originally submitted, "recommend Board consider other options open to them as other Boards have done," is insufficient. The Board spent $42,500 in this account last year. The Board also projected a premium increase of 30-35 percent. If the increase were 35 percent, the actual expense would be $57,375. Even with the Township's reduction, the account seems sufficient to cover needs.

I **FIND** there is no need for restoration to Account 540 and the $1,000 reduction will stand.

There is no dispute concerning the Township's reduction of $10,000 from Account 545. Accordingly, the reduction stands.

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Account 550, transportation-other expenses, covers expenditures for supplies and other expenses for the operation and maintenance of district-owned pupil transportation vehicles and district-operated pupil transportation garages. All gasoline, oil and lubricants, tires, repair parts and bus supplies, as well as supplies and expenses for garage operation are recorded under this group of accounts. The Board states it needs a parking and repair area for its buses. Presently, drivers take buses home at night. There have been many complaints from residents about this situation. Summer parking, which had been done on Township property, is no longer available because of expanding Township needs.

The Township states the Board appropriated over $254,000 to this account in 1986-87, but expended only a little over $135,000. Further, the Board placed last minute orders using 1986-87 funds to pay for items to be used in 1987-88. Gasoline and oil costs had been overstated. Even with growth, $85,000 for this expense is excessive and represents a 41 percent increase in this component of the account. Although the Township acknowledges the need for a bus compound, it argues that the need has existed for several years and there is nothing new this year that requires an expenditure of $48,000 in view of the voters' overwhelming defeat of the budget.

Voter sentiments may not be considered by the governing body. A decision to reduce a line item must be based independently on educational considerations. East Brunswick Board of Education v. East Brunswick Township Council, 48 N.J. 94, 105-106 (1966); Woodbine Board of Education v. Council of the Borough of Woodbine, OAL DKT. EDU 2233-79 (Nov. 9, 1979), adopted, Comm'r of Ed. (Dec. 27, 1979).

Having heard and considered the parol and documentary evidence, I **FIND** the Board has justified a park and repair facility. Accordingly, I **ORDER** $48,000 for that purpose restored to Account 550. With respect to gasoline and oil costs, even taking projected growth into account, a 41 percent increase seems unreasonable. Therefore, $51,000, the balance of the Township's reduction of Account 550, will stand.

The Township reduced Account 610, operations-salaries, from $613,000 to $600,000. The Board asserts that four additional custodians will be needed because of overcrowding situations. The Board points to multiple use of facilities in all buildings. This involves more setup and takedown time. More use of buildings requires more care of buildings.

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The Township believes the $13,000 reduction can be absorbed. The only difference between the Board's appropriation and the Township's is that the Township did not "pad" the salary appropriation by $13,000 more than actual anticipated expenses. The Township originally asserted that its figure would accommodate an 8 percent salary increase for these employees. The Board counters that a negotiated labor agreement provides a 10.5 percent salary increase to these persons for 1987-88.

I **FIND** the Board's reasoning more compelling than the Township's. Increased evening and after-school use of the library and increasing enrollment, among other things, indicate the need for full funding of this account. Accordingly, I **ORDER** that $13,000 be restored to Account 610.

The Township reduced Account 630, operations-heat, from $142,500 to $122,500, a $20,000 reduction. The Township contends, and the Board concedes, that the 1986-87 expenditure was $108,748. The Township suggests that oil prices are declining or stablizing. Although the electric utility has applied for a rate increase, there has been no ruling upon the request by the Board of Public Utilities Commissioners. The Township's appropriation leaves the Board with $13,500 more than was spent last year in this account, a 12 percent increase.

The Board urges that facilities will be used more in 1987-88 than they were in the previous year. Even if oil prices stablize, the Board must be prepared to meet any rate increases granted to its electric utility.

Historical data and common experience support the Township's position. The 12 percent increase that would remain in this account after the Township's reduction will provide the Board with room for additional use of buildings as well as providing some measure of protection against unanticipated utility cost increases. I **ORDER** no restoration to Account 630.

The Township made a $35,000 reduction in Account 640, operations-utilities. The same arguments advanced concerning Account 630 apply here. Even with a reduction of $35,000, this line item contains enough to accommodate growth and to protect against possible utility cost rises. Accordingly, the reduction of $35,000 in Account 640 is sustained. I **FIND** nothing in the arguments to support a greater reduction.

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Account 720 deals with contracted maintenance services. The Board budgeted $458,500 and the Township reduced that amount by $148,500. The acting superintendent testified that $25,000 of the reduction is being transferred at the Township's suggestion to Account 930, food services-expenditures, to cover deficits. He also stated that the governing body directed that $5,000 be cut from sewage disposal. However, the bill from the Lacey Municipal Utilities Authority for disposal is $47,436 (exhibits P-3a, P-3b, P-3c).

The acting superintendent stated the Board reluctantly reduced staff requests in this area to the $458,500 that appeared in the advertised budget. Again, I cannot look behind the budget the Board presented to the voters.

The acting superintendent explained the need for air conditioning on the second floor of the high school. Written and oral testimony establish that certain rooms have been unusable in warm weather. The Board proposed air conditioning for the affected area in the high school and the library at Forked River School only.

The acting superintendent provided a three-page list of items required at each of the schools (prefiled testimony at 37-39). When the sewerage bill and the estimate for air conditioning of the second floor of the high school are added to this list, the amount exceeds the amount originally proposed in the budget for this account. Having heard and reviewed the testimony, I **FIND** the Board has established the need for the full amount budgeted and I **DIRECT** that $148,500 be restored to Account 720. I do not believe that I have the authority to put into that account more than was in the budget presented to the voters. The Board, of course, has the right and the authority to transfer funds between and among accounts as needs fairly dictate.

The Board budgeted Account 730, purchase of equipment, at $217,500. The Township reduced the amount by $81,000.

The acting superintendent testified in some detail concerning replacement of old furniture, chalkboard replacement, physical education equipment, cafeteria needs, locker needs, computer needs and miscellaneous items. I **FIND** that the testimony addresses and supports legitimate educational needs of the system. For that reason, I **DIRECT** that $81,000 be restored to Account 730.

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The Board budgeted $352,900 in Account 730C, purchase of new instructional and non-instructional equipment. The Township reduced the appropriation by $3,100. The Board does not contest this reduction. Accordingly, the reduction of $3,100 to the appropriation for Account 730C will stand.

The Township reduced the appropriation to Account 740, maintenance-other expenses, by $10,000. This account deals directly with maintenance and repair of ventilating equipment, doors, floors, window shades, ceilings, lavatories, athletic fields, and the like. The Board would seem to argue for restoration of more than $10,000 to this account. Once again, I do not believe I have the authority to restore to an account more than the amount that was cut by the governing body.

Accordingly, while I accept the rationale of the Board as given in written and oral testimony for full funding of this account, I can direct replacement of no more than $10,000 because that is the amount by which the Township reduced the appropriation. I **ORDER** that $10,000 be restored to Account 740.

Account 820 deals with insurance and judgments. The Board budgeted $1,393,000 to this account and the Township reduced that amount by $80,000.

This account includes, among other things, the cost of liabilty insurance, health plan insurance and workers' compensation insurance. There are at least 22 new personnel in the district in the 1987-88 year. The health plan insurance carrier notified the district of a 10.25 percent increase over 1986-87 figures. The anticipated cost per employee for this coverage will now be slightly over $3,000.

The Department of Education audit required that the district appraise buildings and contents. It is reasonable to anticipate, therefore, that in addition to any normal increases in the cost of fire insurance that there will also be increases in premiums based on greater values insured.

The Township argues that the Board admitted it could cut $60,000 from this account. Therefore, the Township's reduction should stand.

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Having considered the evidence presented concerning Account 820, I **FIND** that the Board's evidence is sufficient to support restoration of $80,000. I **DIRECT** that $80,000 be restored to Account 820.

Account 930 deals with food services and, particularly, expenditures to cover deficits. The Board and the Township agree that this account should be budgeted at $25,000. The acting superintendent stated in his prefiled testimony concerning account 720 that $25,000 of the cut in that account actually is being transferred to Account 930. Inasmuch as this decision restores Account 720 to its originally budgeted amount, any restoration here would be improper. The Board has the power and authority to transfer $25,000 from Account 720 to Account 930. This opinion leaves any transfers to Account 930 to the discretion of the Board.

The Township originally cut $114,000 from the Board's appropriation to Account 1200, special education-teacher salaries and other expenses.

The Board stated that the use of relocatable classrooms will require an increase of special education staff depending upon the number of pupils and the nature of disabilities at the time the relocatable classrooms become available. Several pupils are assigned to classes that do not correspond to their identified handicaps. These placements are allowed under waivers from the State Department of Education. The Department issued the waivers, in part, because of overcrowding.

Two teachers will be added at an anticipated cost of $45,000 and two aides will be added at an anticipated cost of $12,000. The special education population in the district has been increasing over the last several years and it is reasonable to expect it to increase further.

Notwithstanding the Board's position at its meeting of April 24, 1987 with the governing body, I **FIND** that the special education needs of the district require full funding of this account. Accordingly, I **ORDER** $114,000 restored to Account 1200.

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Summary

The foregoing are summarized as follows:

ACCT. NO.	ITEM	AMOUNT OF REDUCTION	AMOUNT RESTORED	AMOUNT NOT RESTORED
100	Administration-salaries	$ 325,000	$ 325,000	
120	Admin.-contracted services	135,000	135,000	
211	Instruction-salaries-principals	75,000	75,000	
212	Salaries, supvrs. of instruction	56,000	56,000	
213	Instruction-salaries-teachers	123,000	123,000	
214	Instruction-other salaries	37,000	37,000	
215	Instruction-salaries-clerical	26,000	26,000	
230	Instruction-library & materials	11,000	11,000	
240	Instruction-teaching supplies	36,000	36,000	
250	Instruction-other expenses	105,000	105,000	
410	Salaries-health services	16,000	16,000	
420	Other expenses-health	1,000	-0-	$ 1,000
510	Transportation-salaries	60,000	60,000	
520	Transportation-contracted	20,000	20,000	
530	Replacement of vehicles	60,000	60,000	
535	Purchase of new vehicles	20,000	-0-	20,000
540	Transportation-insurance	1,000	-0-	1,000
545	Transportation-curric. activities	10,000	-0-	10,000
550	Transportation-other expenses	99,000	48,000	51,000
610	Operations-salaries	13,000	13,000	
630	Operations-heat	20,000	-0-	20,000
640	Operations-utilities	35,000	-0-	35,000
720	Maintenance-contr. services	148,500	148,500	
730	Purchase-replace equipment	81,000	81,000	
730c	Purchase-new equipment	3,100	-0-	3,100
740	Maintenance-other expenses	10,000	10,000	
820	Insurance and judgments	80,000	80,000	
1200	Special ed.-teacher salaries	114,000	114,000	
	Total current expense	$1,720,600	$1,579,500	$141,100

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ORDER

It is **ORDERED** that $1,579,500 is hereby certified to the Ocean County Board of Taxation in addition to the $6,610,609 already certified to the Board of Taxation for current expense purposes of the Lacey Township School District for 1987-88 school year so that the total amount to be raised by tax levy for current expense purposes for 1987-88 school year shall be $8,190,109.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

28 APRIL 1988
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

4-29-88
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAY 3 1988
DATE

OFFICE OF ADMINISTRATIVE LAW

ds

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BOARD OF EDUCATION OF THE TOWNSHIP OF LACEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MAYOR AND COMMITTEE OF THE TOWNSHIP OF LACEY, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law.

It is observed that the Board's exceptions to the initial decision and the Township's reply to those exceptions were timely filed with the Commissioner pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

Before addressing the respective positions advanced by counsel pertaining to the findings and conclusions set forth in the initial decision, the Commissioner observes from the record of this matter that there are several significant errors that have been made in the initial decision which impact on the findings and conclusions rendered by the ALJ. They appear below as corrected by the Commissioner. Page two of the initial decision states that the Township made $1,720,600 in specific line item reductions in the Board's 1987-88 current expense appropriations to be raised in the local tax levy.

The Commissioner finds and determines from a review of the actual current expense line item reductions attached to the Township's answer to the Petition of Appeal that the total of the current expense line item reductions is $1,403,000. This error also appears on the summary table of page 19 of the initial decision.

It is clear from a review of the summary table on that page that the ALJ misstated the line item reduction imposed by the Township in current expense line item account "100 [110] Administration-salaries." The "Amount of Reduction" in this line item should read $7,400 instead of $325,000. Similarly, the "Amount Restored" in this line item should have been reported as $7,400 instead of $325,000.

Consequently, the summary table on page 19 of the initial decision appears below with the corresponding corrections set forth above:

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ACCT. NO.	ITEM	AMOUNT OF REDUCTION	AMOUNT RESTORED	AMOUNT NOT RESTORED
[110]	Administration-salaries	$ [7,400]	$ [7,400]	
120	Admin.-contracted services	135,000	135,000	
211	Instruction-salaries-principals	75,000	75,000	
212	Salaries, supvrs. of instruction	56,000	56,000	
213	Instruction-salaries-teachers	123,000	123,000	
214	Instruction-other salaries	37,000	37,000	
215	Instruction-salaries-clerical	26,000	26,000	
230	Instruction-library & materials	11,000	11,000	
240	Instruction-teaching supplies	36,000	36,000	
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410	Salaries-health services	16,000	16,000	
420	Other expenses-health	1,000	- 0 -	$ 1,000
510	Transportation-salaries	60,000	60,000	
520	Transportation-contracted	20,000	20,000	
530	Replacement of vehicles	60,000	60,000	
535	Purchase of new vehicles	20,000	- 0 -	20,000
540	Transportation-insurance	1,000	- 0 -	1,000
545	Transportation-curric. activities	10,000	- 0 -	10,000
550	Transportation-other expenses	99,000	48,000	51,000
610	Operations-salaries	13,000	13,000	
630	Operations-heat	20,000	- 0 -	20,000
640	Operations-utilities	35,000	- 0 -	35,000
720	Maintenance-contr. services	148,500	148,500	
730	Purchase-replace equipment	81,000	81,000	
730c	Purchase-new equipment	3,100	- 0 -	3,100
740	Maintenance-other expenses	10,000	10,000	
820	Insurance and judgments	80,000	80,000	
1200	Special ed.-teacher salaries	114,000	114,000	
	Total current expense	[$1,403,000]	[$1,261,900]	$141,100

(Initial Decision, at p. 19)

By virtue of these corrected changes, a corresponding revision is required to be made on page 20 of the initial decision pertaining to the ALJ's recommended order in paragraph 1. However, before addressing the changes to be made on that page, it is necessary to consider the impact of the reductions and restorations made by the ALJ as they affect the original tax levy reduction imposed by the Township. The summary table below is set forth to accomplish this purpose:

Board's Original Current Expense Tax Levy Appropriation	$10,505,198
Township's Original Current Expense Tax Levy Certification	6,610,609
Amount of Original Current Expense Tax Levy Reduction	3,894,589
Amount of Surplus Funds Applied by Township to Tax Levy Reduction	2,016,589

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Amount of 1987-88 Current Expense Tax Levy in Dispute	1,878,000
Amount of Current Expense Line Item Reductions made by Township	1,403,000
Amount of Township's Current Expense Tax Levy Reduction not Specified by Township by Line Item	475,000

In consideration of the amounts summarized above and those total amounts recommended to be "Restored" ($1,261,900) and "Not Restored" ($141,100) as set forth by the Commissioner in his revision of the chart on page 19 of the initial decision, it is apparent that the ALJ only considered the restoration of current expense funds ($1,579,500, revised to $1,261,900) to the local tax levy which were part of the overall current expense line item reductions ($1,720,600, revised to $1,403,000) imposed by the Township. Using the revised total current expense line item reductions ($1,403,000), it is apparent that the remaining amount of $475,000 which represents the difference between the original local tax levy reduction by the Township of $1,878,000 and the total line item reduction amounting to $1,403,000 was not addressed by the ALJ in his order on page 20 of the initial decision.

At this juncture, the Commissioner notes the corrections to be made on page 20, paragraph 1 of the initial decision which shall be addressed in the final determination of the Commissioner herein.

In its exceptions the Board claims that the ALJ erred in sustaining the Township's reductions in the following line items of current expense appropriations:

ACCT. NO.	ITEM	AMOUNT NOT RESTORED
J535	Purchase of new vehicles	$ 20,000
J540	Transportation-insurance	1,000
J545	Transportation-curric. activities	10,000
J550	Transportation-other expenses	51,000
J630	Operations-heat	20,000
J640	Operations-utilities	35,000
J730c	Purchase-new equipment	3,100
	Total	$140,100

The Board argues that these tax levy reductions in current expense line items imposed by the Township and sustained by the ALJ must be restored because of the insufficiency of the reasons set forth by the Township in its resolution adopted on April 27, 1987. (R-6)

In this regard, the Board relies on the following decisional case law in support of its position:

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> The Supreme Court in Board of Education of the Township of East Brunswick vs. Township Council of the Township of East Brunswick, 48 N.J. 94 (1964) established the principle that where a governing body's action entails a significant aggregate reduction in the budget and the 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 reasoning has been further amplified in Board of Education of the Borough of Union Beach vs. Mayor and Council of the Borough of Union Beach, [1973] S.L.D. 231, 232 stating that comments such as the governing body is of the opinion that a reduction can be made; that items seem to be inflated; that it is of the opinion that a position is not needed; or that a reduction works no hardship; are not adequately stated reasons as required in East Brunswick.
>
> A governing body cannot merely indicate conclusions and judgments which it considers to be better than those reasoned determinations made by the Board. Merely setting forth the specific items with conclusionary references is not enough. The failure to enunciate supporting reasons at the time of the reduction renders the reduction an arbitrary act. Further, there must be articulation linking the proposed reduction to some valid educational concern. See also Board of Education of South River vs. Mayor and Council of South River, decided November 20, 1986 O.A.L. Docket No. EDU 4546-86 and Board of Education of the Township of Irvington vs. Mayor and Council of the Township of Irvington, decided October 30, 1987, O.A.L. Docket No. EDU 4447-87.
>
> (Board's Exceptions, at pp. 4-5)

In its reply, the Township avers that the cases cited by the Board, Irvington and South River, are distinguishable from the instant proceedings insofar as those cases dealt with the failure to delineate specific line item reductions so as to provide the underlying rationale for such reductions by the local governing bodies. The Township argues further that its line item reductions as well as its accompanying reasons for its reductions in the Board's current expense tax levy appropriation meet those standards enunciated by the Court in East Brunswick.

The Commissioner, upon review of the record which includes Exhibit R-6 finds and determines that the reasons given by the Township for effecting the current expense reductions in the line items disputed above are, in fact, sufficient to the extent that they comply with the mandate of the Court in East Brunswick. Therefore, absent any evidence presented by the Board to the

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contrary, the total amount of $141,100 not restored to the local tax levy in line item reductions is sustained.

Finally, it is observed that both parties disagree with respect to whether or not the ALJ's findings and conclusions support or reject those amounts of revenues the Township maintains the Board should have included as revenues in its 1987-88 current expense budget to reduce its request for funds to be raised in the local tax levy by $500,000.

The Board maintains that the entire amount of $500,000 consisting of $350,000 in 1986-87 unexpended surplus and $150,000 in unanticipated revenues must be restored to the tax levy in addition to the line item restorations of $1,261,900 directed to be restored by the ALJ.

The Township categorically rejects the Board's assertions with respect to the amounts totalling $500,000 in revenue items. The Township maintains that the ALJ's findings and determinations on pages 6 and 7 of the initial decision may not be construed as his having rejected its recommendation to include these revenues as part of the overall current expense tax levy reduction amounting to $1,878,000.

The Commissioner has reviewed the respective positions of the parties pertaining to the $500,000 in revenue items which the Township has recommended be used by the Board to offset its current expense tax levy request for the 1987-88 school year. Upon review of the record, the Commissioner is not persuaded by the Township's contention that the findings and conclusions in the initial decision call for the Board to appropriate $500,000 in revenue items to reduce the Board's current expense tax levy appropriations for the 1987-88 school year. The Commissioner so holds.

Finally the Commissioner observes that there is a difference of $475,000 between the overall line item reductions imposed by the Township of $1,403,000 and the actual amount of 1987-88 current expense tax levy reductions of $1,878,000 in dispute between the parties. Absent any line item delineation or reason for the imposition of the reduction of $475,000 in the local tax levy, the Commissioner can only conclude that the additional amount of $475,000 in current expense appropriations constitutes that portion of the tax levy reduction which represents the $500,000 in revenue items that the Township recommended to be applied to offset in part its total current expense tax levy reduction of $1,878,000. While the above-stated amounts are not identical, nevertheless it is found and determined that the unspecified amount of $475,000 does in fact represent the difference in the line item reductions of $1,403,000 and the total current expense tax levy reduction of $1,878,000.

The Commissioner relying on Irvington, supra, therefore finds and determines that the $475,000 in revenue items which the Township applied to the tax levy reductions shall also be restored to the local tax levy for current expense purposes.

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Accordingly, the Commissioner adopts as his own those findings and conclusions in the initial decision as modified herein and summarizes below:

Board's Original Current Expense Tax Levy Appropriation	$10,505,198
Township's Original Current Expense Tax Levy Certification	6,610,609
Amount of Original Current Expense Tax Levy Reduction	3,894,589
Amount of Surplus Funds Applied by Township to Tax Levy Reduction	2,016,589
Amount of 1987-88 Current Expense Tax Levy in Dispute	1,878,000
Amount of Current Expense Line Item Reductions Restored to 1987-88 Tax Levy by Commissioner	1,261,900
Amount of Non-specified Current Expense Appropriations Restored to Tax Levy by Commissioner	475,000

Accordingly, the Commissioner hereby certifies $1,736,900 to the Ocean County Board of Taxation in addition to the $6,610,609 previously certified to the Board of Taxation for current expense purposes by the Lacey Township Committee to be made available to the Board of Education of Lacey Township for the 1987-88 school year, so that the total amount to be raised in the local tax levy for current expense purposes for the 1987-88 school year shall be $8,347,509.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

June 10, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 8561-87
AGENCY DKT. NO. 357-12/87

BOARD OF EDUCATION OF THE BOROUGH OF LITTLE FERRY,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD PARK,
Respondent.

Lester Aron, Esq., for petitioner
(Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Dennis G. Harraka, Esq., for respondent
(Gallo, Geffner, Fenster, Farrell, Turitz & Harraka, attorneys)

Record Closed: March 22, 1988 Decided: May 3, 1988

BEFORE EDITH KLINGER, ALJ:

Petitioner, Little Ferry Board of Education (Little Ferry), filed a verified petition on December 4, 1987, with the Commissioner of Education of New Jersey seeking redetermination of the pupil tuition rates charged by the Board of Education of e

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Borough of Ridgefield Park (Ridgefield Park) for the years 1974 through 1986 and the return of any overpayment discovered. Respondent filed its answer on December 15, 1987 and on December 22, 1987 the Department of Education, Bureau of Controversies and Disputes transmitted this matter to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

After notice to all parties, a prehearing conference was held on February 18, 1988 at which it was determined that the following matters were at issue:

a. Did respondent correctly compute the tuition rates charged to petitioner in accord with N.J.S.A. 18A:38-18 and N.J.A.C. 6:20-3.1 et seq. for the years 1974 through 1986.

b. If not, what is the appropriate remedy.

c. Is petitioner's claim time barred in whole or in part pursuant to N.J.A.C. 6:24-1.2(b).

d. Is petitioner's claim barred in whole or in part by the doctrine of laches.

Because of the extent of discovery involved, it was agreed at the prehearing conference that respondent Ridgefield Park would move for summary decision on issues "c" and "d" before discovery began or a hearing date was set. Respondent filed its motion papers and petitioner filed its response on March 22, 1988.

Little Ferry, the sending district, seeks redetermination of the pupil tuition rates charged by Ridgefield Park, the receiving district, for the years 1974 through 1986 and the return of any overpayment discovered on the grounds that improper and illegal charges may have been included in the tuition costs.

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Ridgefield Park argues that it informed Little Ferry of the certified actual cost per pupil for the 1985-1986 school year on June 19, 1987 when it forwarded to Little Ferry the results of the Department of Education's audit of Ridgefield's certified costs per pupil for tuition adjustment purposes. Ridgefield Park maintains that any appeal as to the tuition rate should have been taken within 90 days of the date of receipt of these final costs.

The facts are not in dispute. The following are the facts as set forth in the Certification of Lester Aron submitted in support of respondent's motion to dismiss.

1. The Little Ferry Board of Education (hereinafter referred to as "Little Ferry") sends their high school students to the Ridgefield Park School District, the receiving district.

2. The Ridgefield Park Board of Education (hereinafter referred to as "Ridgefield Park") charges Little Ferry tuition for each such pupil, in accordance with N.J.S.A. 18A:38-19 and N.J.A.C. 6:20-3.1.

3. Said sending-receiving relationship has existed since approximately 1974.

4. As in prior years, and pursuant to N.J.A.C. 6:20-3.1(d)(2), Ridgefield Park notified Little Ferry of the estimated cost per pupil for the 1985-86 school year in a timely fashion.

5. Little Ferry paid tuition for its pupils sent to the Ridgefield Park High School in accordance with said estimated figure.

6. On June 11, 1987, Ridgefield Park received certified costs per high school pupil for the 1985-86 school year for tuition adjustment purposes from the Assistant Commissioner, Vincent B. Calabrese.

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7. Ridgefield Park, by Joseph M. Cappello, Business Administrator, notified Mr. Arthur Hirtler of Little Ferry of said certified figures on June 19, 1987.

8. Ridgefield Park planned to credit Little Ferry for the difference between the estimated tuition cost and the actual tuition cost based on the June 1987 figures.

9. Little Ferry filed a petition in this matter with the Commissioner of Education on or about December 3, 1987, over five (5) months after it received the financial information in question.

10. Little Ferry is attempting to review not only the 1985-86 school year tuition assessments but those of the prior eleven (11) school years.

The 90-day rule is set forth in the following regulation:

> 6:24-1.2 Filing and service of petition
> (a) To initiate a contested case for the commissioner's determination of a controversy or dispute arising under the school laws, a petitioner shall serve a copy of a petition upon each respondent. The petitioner then shall file proof of service and the original of the petition with the commissioner c/o the Director of the Bureau of Controversies and Disputes, New Jersey Department of Education, 225 West State Street, CN 500, Trenton, New Jersey 08625.
> (b) The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education which is the subject of the requested contested case hearing.

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This matter substantively is governed by the following statute and the regulations promulgated thereunder.

> 18A:38-19 Tuition of pupils attending schools in another district
>
> Whenever the pupils of any school district are attending public school in another district, within or without the state, pursuant to this article, the board of education of the receiving district shall determine a tuition rate to be paid by the board of education of the sending district to an amount not in excess of the actual cost per pupil as determined under rules prescribed by the commissioner and approved by the state board, and such tuition shall be paid by the custodian of school moneys of the sending district out of any moneys in his hands available for current expenses of the district upon order issued by the board of education of the sending district, signed by its president and secretary, in favor of the custodian of school moneys of the receiving district.

N.J.A.C. 6:20-3.1, a regulation promulgated under this statute, describes the method of determining tuition rates and a scheme by which the sending district may pay a tentative tuition rate to the receiving district subject to a later adjustment for overpayment based upon audited expenditures for the year in question. N.J.A.C. 6:20-3.1(d)3 states:

> 3. If the commissioner later determines that the tentative tuition charge established by written contractual agreement, except for a contractual agreement for a pupil enrolled in a special education class, was greater than the actual cost per pupil during the school year multiplied by the actual average daily enrollment received, the receiving district board of education shall return to the sending district board of education in the third school year following the contract year the amount by which the tentative charge exceeded the actual charge as determined above, or, at the option of the receiving district board of education shall credit the sending district board of education with the excess amount. Such adjustment for a contractual agreement for a pupil enrolled in a special education class shall be made no later than the end of the third school year following the contract year.

This version of the provision has been in effect since 1985. The earlier version provided that the receiving district return to the sending district the amount by which the tentative rate exceeded the actual cost per pupil or, at the option of the receiving

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district, credit the sending district with the excess amount. The amendment merely extended to the third school year following the contract year the time by which the overcharge could be repaid or credited to the sending district.

In this case, a contract has existed since 1974 between Little Ferry and Ridgefield Park under which Little Ferry pays tentative tuition charges set by Ridgefield Park subject to receipt of certified costs per pupil audited by the Department of Education; Ridgefield Park in compliance with the contract and regulation planned to credit Little Ferry for the difference between the tentative and actual tuition cost based upon this audit.

In Board of Education of the Borough of Kinnelon v. Board of Education of the Borough of Riverdale, OAL DKT. EDU 6257-85 (April 4, 1986), the administrative law judge (ALJ) determined that for purposes of an appeal concerning the adjustment of tuition rates based upon N.J.A.C. 6:20-3.1, the 90-day rule applied and the 90-day period began to run when the sending district refused to pay the adjustment demanded by the receiving district. The Commissioner, reversing the ALJ, stated that the 90-day period began to run from the time the sending district learned of "the amount actually due and payable by Riverdale." The Commissioner found that it "was upon receipt of Assistant Commissioner Calabrese's audit and letter dated July 3, 1985 that N.J.A.C. 6:24-1.2 was properly triggered." Kinnelon v. Riverdale, Commissioner's decision of May 22, 1986, at 17. The appeal was remanded to the Commissioner by the State Board and, ultimately, in a decision of January 8, 1988 the State Board reversed the Commissioner's decision for other reasons (specifically because the sending/receiving contract between the two school districts had expired prior to the year for which Kinnelon was seeking additional tuition amounts).

The State Board at no time disapproved the determination by the Commissioner that the 90-day period should run from the date the sending district receives the certified costs per pupil for tuition adjustment purposes from the State Department of Education.

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That determination is hereby **ADOPTED** by this administrative law judge for purposes of this appeal.

Little Ferry argues that the operation of the 90-day rule should be suspended because, at the time it received certified costs, it had no notice that "there were improper and illegal charges included in the tuition cost." It therefore urges relaxation of the rule in accord with N.J.A.C. 6:24-1.17. It also asserts that if all sending school districts were required to file petitions of appeal upon receipt of certified costs, it would flood the Commissioner with presumptive disputes which might never mature into controversies.

Under any circumstances, all claims Little Ferry might have against Ridgefield Park which are over six years old are barred by statute of limitation. N.J.S.A. 2A:14-1 prohibits any action for recovery upon a contractual claim or liability six years after the cause of action has accrued. The relationship between the sending and receiving school districts being based upon contract, all claims over six years old are clearly so barred.

The 90-day rule set forth in N.J.A.C. 6:24-1.2 more specifically applies to contractual relationships between sending and receiving school districts and therefore must be applied rather than the six-year limitation of N.J.S.A. 2A:14-1.

Little Ferry urges that there are equitable reasons for tolling the statute of limitations or barring Ridgefield Park's equitable defense of laches because of the consequences that failure to make restitution would have on the taxpayers of Little Ferry.

Little Ferry's argument is rejected. Ridgefield Park also has a compelling equitable interest as presented by the Supreme Court of New Jersey in Lavin v. Hackensack Board of Education, 90 N.J. 145 (1982). The taxpayers of Little Ferry have already budgeted and paid Ridgefield Park for the assessed tuition since 1974, although they now suspect the amount of payment may have been excessive. To require Ridgefield Park at this time to return overpayments accumulated between 1974 and 1986 would have serious consequences for that municipality.

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> Municipal financing is predicated on a pay-as-you-go principle. See, Passaic v. Local Finance Board of the Department of Community Affairs, 88 N.J. 293, 301 (1982); Giorno v. Township of South Brunswick, 170 N.J. Super. 162, 166 (App. Div. 1979). The governing body must prepare a budget "on a cash basis." N.J.S.A. 40A:4-3. This entails a listing of proposed expenditures. By understating its expenses, the Board of Education was innocently reducing the amount of funds to be raised by taxation. This situation was aggravated because the underestimating occurred for ten years. To rectify the error would necessitate including in the current budget the full aggregate amount claimed. This could have the dual effect of causing some other service to be diminished because of the limitations imposed by the Cap Law, N.J.S.A. 18A:7A-25, and of imposing the complete tax burden on the existing taxpayers for costs that should have been distributed over a ten-year period. Lavin at 154.

The court concludes at page 154 that "Under these peculiar circumstances, wherein public entities are involved, petitioner and others situated like her should not be granted retroactive monetary relief." In this case the Borough of Little Ferry should not be granted retroactive monetary relief but steps must be taken to ensure that future tuition charges are computed correctly.

There is no reason to believe that the Commissioner of Education will be flooded with appeals. In most cases, there should be ample time, not only within the 90 days from receipt of the certified costs per pupil but also throughout the ongoing contractual relationships between sending and receiving districts, to monitor the expenditures included in computing tuition rates.

I therefore **CONCLUDE** that Little Ferry was obliged to appeal the tuition rate charged each year within 90 days of receipt of the Commissioner's determination for the year or lose its right to appeal the charges.

I further **CONCLUDE** that there is no equitable reason to extend the 90-day requirement of N.J.A.C. 6:24-1.2 to allow Little Ferry's claims in this case. Accordingly, I **CONCLUDE** that all claims by Little Ferry against Ridgefield Park for overpayment of tuition charges are barred except for those claims for which Little Ferry received final

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actual audited costs within the 90 days prior to the filing date of this appeal, December 4, 1987. Ridgefield Park has or should have already budgeted for the return of any overpayments under N.J.A.C. 6:20-3.1(d)3 for the years affected.

Since Ridgefield Park notified Little Ferry of the certified costs on June 19, 1987, and the appeal by Little Ferry of the 1985-1986 school year tuition assessments was not filed until December 4, 1987, I **CONCLUDE** that it was filed out of time as were the appeals for all prior years. There is, accordingly, no need to reach the merits of this case.

ORDER

It is therefore **ORDERED** that summary judgment should be and hereby is **GRANTED** in favor of Ridgefield Park against petitioner for failure to file its appeals in a timely manner in accord with N.J.A.C. 6:24-1.2(b).

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

May 3, 1988
DATE

Edith Klinger
EDITH KLINGER, ALJ

Receipt Acknowledged:

5/5/88
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

MAY 6 1988
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

PAR/e

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BOARD OF EDUCATION OF THE BOROUGH :
OF LITTLE FERRY, BERGEN COUNTY,

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE VILLAGE : DECISION
OF RIDGEFIELD PARK, BERGEN COUNTY,

RESPONDENT. :

:

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner filed timely exceptions pursuant to N.J.A.C. 1:1-18.4. Respondent filed timely reply exceptions thereto.

Petitioner takes exception to the following three findings of the ALJ:

1. That the ninety-day rule runs from the date it received notice from the Department of Education as to the cost per pupil for tuition purposes;

2. That there are no equitable reasons to justify the waiving of the ninety-day rule; and

3. That the law does not allow for retroactive relief between municipalities or governing bodies.

In support of the above exceptions, petitioner relies on its letter memorandum in opposition to respondent's Motion for Summary Judgment. It adds in reference to Exception Number 2 that without a full hearing to determine what factual steps petitioner undertook to determine if a dispute existed, the ALJ

> could not possibly know if equitable grounds existed to waive the ninety (90) day rule. The essence of the Petitioner's claim is that the Respondent receiving district used improper, illegal and possibly fraudulent practices in allocating costs in order to arrive at the cost per pupil for tuition purposes. ***The only way to discover such practices is to conduct a full audit designed for such purposes. This would be akin to a certified audit or an I.R.S. audit. Before a sending district undertakes such a serious audit, it should have some basis to act.

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> In the case at bar, the facts would show that for the five (5) months, from the time the Petitioner received the Commissioner's cost per pupil analysis, the Petitioner attempted to meet with the Respondent to lay to rest some of the allegations which gave rise to the Petitioner's concerns. The Petitioner did not want to make unfounded allegations of improper bookkeeping and/or possible fraud without first gathering all the facts. It was only after much reluctance and delay that the Respondent allowed the Petitioner access to its books for a preliminary audit by the Petitioner's accountants. After a preliminary audit discovered major discrepancies, the Petitioner sought to meet with Respondent to try to get further clarification of the discrepancies. It was only after the discrepancies could not be justified did the Petitioner file its Petition requesting the relief sought. It is only at this point did the Petitioner have real notice of a dispute.
>
> By no means is the Department of Education's audit to certify cost per pupil, the type of audit designed to ferret out the misconduct alleged by the Petitioner. If the Commissioner accepts the Administrative Law Judge's decision, it will force all sending districts to file suits within ninety (90) days of receiving the Commissioner's certified cost per pupil statement merely to toll the statute of limitations regardless of whether or not they have any real knowledge or notice of any illegal or improper acts by the receiving district.
>
> (Exceptions, at p. 2)

Petitioner submits that the ALJ's decision should be reversed and it be given an opportunity to proceed with its claim.

In reply to petitioner's exceptions, respondent relies primarily on its letter memorandum and accompanying papers in support of its Motion for Summary Judgment. Respondent again cites Markman v. Board of Education of Teaneck, decided by the Commissioner August 22, 1986, for the proposition that "as a matter of law, the ninety-day rule shall not be defeated merely because a Petitioner makes a claim that it made attempts to amplify notice that has been given by a potential Respondent." (Reply Exceptions, at p. 2) Respondent avers that if the ninety-day rule is not applied strictly in the instant matter, there will be opened a "floodgate of hearings by Petitioners who claim that the ninety-day statute of limitations should be tolled and that only a hearing can put to rest whether such tolling is warranted. Such a result would result in the endless spending of public funds to defend such hearings." (Id., at p. 3)

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Respondent again recites its reliance on Board of Education of the Borough of Kinnelon v. Board of Education of the Borough of Riverdale, decided by the Commissioner May 22, 1986 for the proposition which was not reversed on the appeal of this case to the State Board in its decision dated January 8, 1988 "that the ninety-day period should run from the date the sending district receives certified costs per pupil for tuition adjustment purposes from the State Department of Education." (Reply Exceptions, at p. 3) Ridgefield Park avers that it should be able to rely on this well-established rule.

Lastly, Ridgefield Park avers that, in accord with Lavin v. Hackensack Board of Education, 90 N.J. 145 (1982), it has a compelling equitable interest that would preclude relaxation of the ninety-day rule. "That is, while Little Ferry now questions payments it made to Ridgefield Park for assessed tuition since 1974, the taxpayers of Little Ferry have already budgeted and remitted such payments to Ridgefield Park over the past approximate twelve years. To require Ridgefield Park at this time to return such overpayments would have serious consequences for that village." (Reply Exceptions, at pp. 3-4) It is for this reason, respondent claims, that petitions of appeal regarding allocations were required to be filed within ninety days of notice of possible faulty figures.

Respondent would have the decision below affirmed.

Upon his careful and independent review of the record of this matter, the Commissioner affirms substantially for the reasons expressed in the initial decision. He adds the following.

Little Ferry's exceptions bring nothing new to the record. The Commissioner concurs with the ALJ's reliance upon Kinnelon v. Riverdale, supra, for the proposition that the ninety-day rule applies under the instant fact pattern and further that the ninety-day period began to run from the time Little Ferry was made aware by Ridgefield Park of the actual per pupil rates for the year in question, on June 19, 1987. Notwithstanding Little Ferry's contention that it "sought to meet with Respondent to try to get further clarification of the discrepancies" (Exceptions, at p. 2), three months was certainly adequate time within which to make a determination as to whether such discrepancies did in fact exist and, if so, whether it should challenge such figures before the Commissioner. Having failed to do so, the Commissioner agrees with the determination of the ALJ below that the instant matter was subject to the ninety-day time restraints, that it rested on its rights and, further, that it has failed to bear its burden of presenting an equitable reason to extend the ninety-day requirement of N.J.A.C. 6:24-1.2 to allow Little Ferry's claims in this case, either for the 1985-86 school years or for the years 1974-86.

Accordingly, the Commissioner adopts as his own the findings and conclusion of the Office of Administrative Law dismissing the instant Petition of Appeal as being untimely in accordance with N.J.A.C. 6:24-1.2 for the reasons expressed in the initial decision as amplified herein.

COMMISSIONER OF EDUCATION

June 16, 1988

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BOARD OF EDUCATION OF THE BOROUGH :
OF LITTLE FERRY, BERGEN COUNTY,

PETITIONER-RESPONDENT, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE VILLAGE : DECISION
OF RIDGEFIELD PARK, BERGEN COUNTY,

RESPONDENT-APPELLANT. :

:

Decided by the Commissioner of Education, June 16, 1988

For the Petitioner-Respondent, Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross (Lester Aron, Esq., of Counsel)

For the Respondent-Appellant, Gallo, Geffner, Fenster, Farrell, Turitz & Harraka (Dennis G. Harraka, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

November 1, 1988

Pending N.J. Superior Court

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6009-87
AGENCY DKT. NO. 243-7/87

DENNI FOSTER,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF BARRINGTON,
Respondent.

Robert M. Schwartz, Esq., for petitioner

M. Allan Vogelson, Esq., for respondent (Mitnick, Vogelson, Josselson & DePersia, attorneys)

Record Closed: April 12, 1988 Decided: May 3, 1988

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

Denni Foster, petitioner, alleges and the Barrington Board of Education (Board), respondent, denies that the Board improperly failed to renew her employment as an elementary school principal.

This matter was opened before the Commissioner of Education and was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. After notice, a prehearing conference was held on November 17, 1987, and, among other things, it was settled that the issues to be resolved are whether the nonrenewal of the petitioner's employment was (1) a misapplication of Board authority, (2) tainted by conflict of interest, (3) a violation of the Open Public Meetings Act, (4) a violation of the petitioner's employment contract, or any of these, and, if so, to what relief the petitioner is entitled.

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The matter was heard on February 29, 1988, in the Merchantville Municipal Court, Camden County. The parties timely submitted post-hearing submissions and the record closed on April 12, 1988.

Upon the beginning of hearing, the petitioner withdrew her fourth claim. The petitioner also stipulated that the present Board attorney was not involved in the matter of Anthony Negro v. Board of Education of the Borough of Barrington, OAL DKT. EDU 5302-85 (Oct. 21, 1987).

PAROL AND DOCUMENTARY EVIDENCE

The Board employed the petitioner as an elementary school principal from August 20, 1985, through the end of June 1987. She served as principal of the Culbertson School and of the Avon School. The petitioner also served as the Board's affirmative action officer. Her evaluations (P-1 through P-6) were uniformly good. At the end of her first year of service, the superintendent recommended the petitioner's reemployment.

At some time in early 1987, the petitioner and the superintendent discussed reemployment. The superintendent stated he would recommend her reemployment as the elementary principal for 1987-88. The superintendent did so. On April 27, 1987, at 9:40 a.m., the petitioner was notified that personnel would be discussed at the regular Board of Education meeting to be held that night.

The petitioner attended the meeting. Her employment was not discussed. However, her contract was not renewed.

The petitioner began correspondence with school officials (J-5a through J-5j). One result of this correspondence was the petitioner's appearance before the Board on Wednesday, June 17, 1987. From uncontroverted testimony at the hearing, it appears that the petitioner made her views known to the Board but the Board said little in response. The petitioner had received a letter dated May 14, 1987, expressing the reason for her nonrenewal as:

> The Board of Education is in the process of negotiating a settlement of the litigation presently before the Office of Administrative Law that will result in the appointment of Mr. Anthony Negro to Principal of Avon School (J-5e).

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The superintendent's testimony verifies that he advised the petitioner of the Board's April 27 meeting concerning employment. He represented to the petitioner that he would recommend her renewal. He did not mention settlement of the Negro matter until April 28, the day after the Board meeting.

The Board held two executive sessions to discuss the Negro litigation, one on April 13, 1987 (J-18), and one on April 21, 1987 (J-17). It also appears that four new members were seated on the Board on April 13, 1987. The Board was at its full strength of nine members both before and after the 1987 election.

Special counsel to the Board, retained to handle the Negro matter, testified. He attended a special session of the Board on April 13 and reviewed the status of the Negro matter and alternatives in executive session. The election may have had something to do with the Negro settlement. There were two factions in town, one pro-Negro and one anti-Negro. The new Board wanted to review the whole case with him. There had been a hearing in the Negro matter, but the matter was not yet concluded at the time of this meeting. He advised the Board that it had a good case. His sense of the meeting, however, was that the Board wanted settlement. Therefore, he was not surprised when he was later advised to settle the matter.

The witness recalled that, at a meeting with the Board prior to election to discuss the case, the majority view was to litigate.

The superintendent testified that in the spring of 1987, the only principals in the district were Foster and Kirschling, the latter being principal of the middle school. Kirschling was appointed in August 1984, one year before the petitioner. Negro never had served in a supervisory capacity in the middle school. The Board did not discuss placing him in any capacity in the middle school. If Negro came back, the feeling of the Board was that they were going to put him in an elementary school. Kirschling is tenured; Negro is not now tenured as a principal.

Negro served as a teacher beginning in approximately 1976 and is tenured in that category. He is now serving as elementary principal. On April 27, 1987, neither Kirschling nor Foster had tenure. When the concept of settlement of the Negro matter came up, the Board asked the superintendent which principal he wanted to keep if one

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"had to go." The superintendent told the Board he would retain Kirschling. The witness also testified that the Board did not, prior to April 1987, ask him for his judgment concerning the hiring of Negro as principal or his judgment concerning the nonrenewal of Foster. The middle school principal was not tenured at that time. Negro could, at least theoretically, have been placed in the middle school. In spring of the 1984-85 school year, while Negro was serving as an elementary principal, the superintendent recommended that the Board not renew Negro's employment as principal.

MOTIONS

Upon conclusion of testimony, the Board moved to dismiss the four counts in the petition. Concerning the first count, the Board argued that the petitioner had produced no proofs that her employment had been discussed by the Board before she had notice of such discussions. On the basis of the testimony in the record, I **DENIED** this branch of the motion.

The Board further argued that the respondent's unrebutted proofs show no conflict of interest. The extent of Negro's contact with present Board counsel some years ago was limited to one letter on Negro's behalf. Negro then secured other counsel. I **DETERMINED** that there was no impropriety or appearance of impropriety or conflict in this. This branch of the Board's motion was **GRANTED.**

The Board also argued that the charge that its act was ultra vires must be dismissed on the record. Given the state of affairs and the superintendent's decision to retain the untenured middle school principal, the Board had a right to do what it did. The only thing that happened was that Board opinion changed.

The petitioner countered that arbitrariness and caprice were demonstrated. The only reason for her removal was the reinstatement of Negro. I **DENIED** dismissal of the count at that point, reserving the right to consider the question more fully in this opinion.

The Board last argued to dismiss count four because it argued that the petitioner received notice of the meeting of April 27. There was no evidence of prior discussion of her position before April 27 and therefore no proof of violation.

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The petitioner rebutted that even if the tapes of the April 13 and 21 Board meetings do not mention Foster, the reinstatement of Negro is discussed at length. It was obvious that an existing principal would have to go. I **DENIED** this branch of the motion to dismiss.

DISCUSSION AND DETERMINATION

Anthony Negro preceded Denni Foster as an elementary school principal in the Barrington district. The superintendent testified in this matter that he had not recommended Negro's reappointment in the spring of 1985 and that his reasons for not recommending Negro had not changed in the spring of 1987 when the Board voted to reinstate Negro in the position of elementary principal.

Settlement of the Negro matter was discussed in an executive session on April 13, 1987 (J-18). One of the options special counsel offered to the Board was, "as a new board you can decide to reappoint if you've got an opening and/or a nontenured administrator to be [inaudible] to make room." Later in the same meeting, the Board was advised that it could approach Negro's counsel and say, "We are willing to rehire him, but he must agree to withdraw his suit with prejudice." Ibid.

On April 21, the Board again met in executive session to discuss the matter (J-17). From the discussion at that meeting, it is clear the Board intended to have only two principals, that it intended to reinstate Negro and make a tenure decision a year after reappointment, and that the Board knew it had to notify one of the other administrators by April 30 that he or she would not be reemployed. The sequence of events following the April 21 Board meeting is laid out in the parol and documentary evidence in the record. The reason given to the petitioner for her removal was:

> The Board of Education is in the process of negotiating a settlement of the litigation presently before the Office of Administrative Law that will result in the appointment of Mr. Anthony Negro to Principal of Avon School (J-5e).

On February 25, 1988, the Office of Administrative Law, by the Honorable Richard J. Murphy, ALJ, issued an Initial Decision approving a stipulation of settlement in Anthony Negro v. Board of Education of the Borough of Barrington, OAL DKT. EDU 5302-85 (Oct. 21, 1987).

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The petitioner maintains that were it not for Negro's reinstatement, she would have been reemployed. Despite the fact that her fate was intertwined with Negro's, the petitioner was never advised that the Board was meeting on April 14 and 21, 1987, to discuss reinstating Negro, which clearly meant displacing her.

The petitioner urges that the action of the Board in dismissing her was politically motivated and therefore must be reversed. In Cullum v. Bd. of Education of Tp. of North Bergen, 15 N.J. 285 (1954), the Court set a standard for how Board members are to discharge their personnel duties. The Court stated:

> The members of the respondent board of education hold positions of public trust and must at all times faithfully discharge their functions with the public interest as their polestar. [Citations omitted.] Amongst their most vital and responsible duties is the proper selection of personnel . . . Id. at 292.

The petitioner insists that the Board voted to terminate her without ever requesting review of her personnel file. Had the Board reviewed the file, she claims, it would have found an unblemished record. However, petitioner argues, the selection process was not based on performance, and her dismissal was politically motivated. The petitioner cites many cases condemning intrusion of politics into the process of selecting school personnel.

The petitioner states that the discussions leading up to the April 27 dismissal took place in violation of her rights under the Open Public Meetings Act, and therefore the decision of the Board to dismiss her must be reversed. N.J.S.A. 10:4-12b(8) states that a public body may exclude the public only from that portion of a meeting at which the Board discusses:

> Any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion or disciplining of any specific prospective public officer or employee or current public officer or employee employed or appointed by the public body, unless all the individual employees or appointees whose rights could be adversely affected request in writing that such matter or matters be discussed at a public meeting.

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In Rice v. Union Cty. Reg. High School Bd. of Ed., 155 N.J. Super. 64 (App. Div. 1977), the court determined that this statute gives all public employees the right to be notified beforehand of any meeting in which their rights could be adversely affected. This is the only way employees can effectuate their right to ask for such matters to be discussed in public.

It is established that two meetings took place immediately after the election of April 7, 1987. At the April 13 meeting, the Board heard from its special counsel as to its legal position in the Negro matter. The purpose of the discussion was to discuss settlement of that matter. A similar discussion concerning settlement of the matter took place on April 21. At that meeting, Negro's attorney presented his legal position and asked the Board to provide the relief he was asking on behalf of his client, namely, reinstatement to the elementary principalship.

Both meetings clearly affected the petitioner's continued employment. The reinstatement of Negro had to mean the release of the petitioner. There were only two principalships in the district, the superintendent had recommended that the middle school principal be awarded tenure, and Negro had experience only at the elementary level.

The meetings of April 14 and 21, 1987, led to the action of April 27 which adversely affected the continued employment of the petitioner. She argues that she ought to have been notified of what was transpiring during the month of April, and, at least, ought to have been given the opportunity to have participated in the discussions of April 7 and 14. The petitioner does not contend that she should have been involved in the discussion of whether to settle the Negro matter or not. Nevertheless, she should have been provided the opportunity to be heard concerning whether Negro ought to be reinstated to the position she then held. The petitioner claims she was the absent but necessary party to every discussion that related to reinstatement of Negro.

The petitioner insists that the Board did not open to the public any discussion as to what was best for the school system and it did not give advance warning to her that she was to be denied renewal so that Negro could be reinstated.

The Board argues that its superintendent notified the petitioner by telephone on April 23 that she and her position would be discussed at the April 27 public Board meeting.

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The superintendent also told the petitioner he would recommend her for renewal, but said he was not optimistic about her chances. The petitioner advised that, even though the schools were closed for Easter recess, she would be in her office the next day, April 24. The superintendent stated he went to the petitioner's school that day and hand-delivered written notices to the mailboxes of personnel who would be discussed on April 27 (J-5a).

The petitioner did not request that discussion of her contract renewal be public. On April 27, 1987, the Board voted 7-2 not to renew the petitioner's contract. By letter to the superintendent dated April 28, the petitioner asked for a transfer to an alternate position "because of the necessary RIF resulting from the expected outcome of the Negro litigation" (J-5b). The petitioner then requested and received reasons for nonrenewal and an informal hearing before the Board.

In the present matter, the superintendent testified that there were two active schools in the district and that both principals were nontenured. He recommended that the Board renew the employment of the middle school principal and not renew the employment of the petitioner.

The petitioner admits that the Board's action was not hostile toward her personally. Nevertheless, she believes the Board was bound to continue the Negro litigation to a conclusion, regardless of its feelings about the case or its outcome or the cost. The petitioner also seems to urge that if the superintendent recommended her renewal, regardless of the Board's desire to end the Negro litigation the superintendent's recommendation had to be followed.

Boards of education have wide latitude in choosing whom they wish to employ. Moreover, unless requested, no reason at all need be given a nontenured employee whose contract is not renewed. Donaldson v. North Wildwood Bd. of Ed., 65 N.J. 236 (1974). However, the Board voted to settle the Negro litigation, and thus required the creation of a vacancy. The superintendent elected to retain the middle school principal, and to give Negro the elementary position. This was nothing more than the reinstatement of a person who was thought to be qualified to a position he had held prior to the petitioner's appointment two years before.

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In this case, the meetings of April 13 and 21, 1987, were properly advertised. They were in closed session because, as discussions involving settlement of litigation, they were exempt from the Open Public Meetings Act's public discussion requirements. No discussions concerning the employment of petitioner or anyone else took place. The only employment discussed was Negro's. No action was taken at either meeting and no public action was taken at those times following the closed sessions as in Rice.

The petitioner knew beforehand that her employment, and the employment of others, would be discussed at the April 27, 1987 meeting. She did not contact the other principal or teachers to ask them to join in a request for public discussion, as required by the cited statute. She had the right to request her renewal alone be discussed publicly. Oliveri v. Carlstadt - E. Rutherford Bd. of Ed., 160 N.J. Super. 131 (App. Div. 1978). Had the petitioner made such a request, the matter would have been discussed publicly and she would have had the input she now seeks and complains that she has been denied. No formal action to reinstate Negro was taken until the public meeting of June 1, 1987. This alone distinguishes the present matter from Rice. The petitioner's letters of April 28 (J-5b) and May 14 (J-5f) to the superintendent clearly show that the petitioner believed the Board was going to reinstate Negro.

The rights protected in Rice and Oliveri are personal and can only be invoked or waived by the person affected, here the petitioner. The petitioner seems to argue that even though Negro was being discussed, and not she, she had the right to notice since discussions of Negro in turn affected her. There is no support in case law for this interpretation. As indicated, only the person under discussion may invoke or waive the right to public discussion.

The Board also asserts that there is nothing in the record to indicate that the petitioner requested a public hearing of her own personal matter, either at the April 27 meeting or at the informal meeting between her and the Board on June 17.

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In consideration of the foregoing, I FIND:

1. The Barrington Board of Education employed the petitioner as an elementary school principal from August 20, 1985 - June 30, 1987.

2. The evaluations of the petitioner's service were uniformly good.

3. The petitioner had notice that her reemployment would be discussed at the April 27, 1987 Board meeting.

4. The Board voted on April 27, 1987, not to renew the petitioner's employment for the 1987-88 school year.

5. The superintendent of schools notified the petitioner on April 28, 1987, that her employment was nonrenewed because of settlement of Anthony Negro v. Board of Education of the Borough of Barrington, OAL DKT. EDU 5302-85 (Oct. 21, 1987), under which Negro was reinstated as elementary school principal.

6. The petitioner requested and received a written reason for her nonrenewal and an informal hearing before the Board at which she expressed her beliefs and feelings about the nonrenewal.

Virtually any grounds for nonrenewal, unless constitutionally proscribed, are permissible. Bachir v. Garfield Bd. of Ed., OAL DKT. EDU 8169-82 (Apr. 11, 1983), adopted, Comm'r of Ed. (May 25, 1983). A board of education enjoys wide discretion in deciding when to terminate a teaching staff member's employment. In Dore v. Bedminster Tp. Bd. of Ed., 185 N.J. Super. 447 (App. Div. 1982), the court indicated that the decision of the Commissioner of Education recognized a board's right to base its decision not to reemploy a teaching staff member on matters outside the teacher's evaluations because of a board's virtually unlimited discretion in hiring or nonrenewing nontenure staff. The court further indicated:

> Implicit . . . is the recognition by the court that absent constitutional constraints or legislation affecting the tenure rights of teachers, local boards of education have an almost complete right to terminate the services of a teacher who has no tenure . . . Id. at 456.

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Dore merely confirms the existing law: boards of education in New Jersey have unlimited discretion to decide in a nontenure context who will be retained and who will not be retained as teaching staff members so long as that decision does not violate a teacher's constitutional or legislatively conferred rights. There are no constitutional rights affected in the present matter nor are any legislative rights disturbed by the Board's decision here. That the petitioner, as a nontenured teaching staff member, had no property right to continued employment that required additional due process procedures beyond those accorded is consistent with Board of Regents v. Roth, 408 U.S. 564 (1972), and Perry v. Sindermann, 408 U.S. 593 (1972).

I **CONCLUDE** that the Board's determination not to reemploy the petitioner was an act within its discretionary authority. It is well established that boards of education are responsible for the legality of their acts to the Commissioner of Education and for the wisdom of their acts to the electorate. While the Board's decision in this matter may seem unfair to some, I cannot reach the determination that the action must be reversed.

I further **CONCLUDE** that the petitioner had notice, albeit short notice, that her employment would be discussed at the Board meeting on April 27, 1987. I also **CONCLUDE** that there has been no violation of the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq. I **CONCLUDE** that the action of the Board was not ultra vires. The petitioner having failed to carry the burden of proof, I **ORDER** that the petition of appeal be and is hereby **DISMISSED.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

3 MAY 1988
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

5-6-88
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

MAY 6 1988
DATE

OFFICE OF ADMINISTRATIVE LAW

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DENNI FOSTER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BARRINGTON, CAMDEN COUNTY	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law.

It is observed that no timely exceptions to the initial decision were filed with the Commissioner by the parties pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

Upon review of the record the Commissioner finds and determines that the ALJ properly found and concluded that the Board's decision not to reemploy petitioner as an elementary principal at the conclusion of the 1986-87 school year was a proper exercise of its statutory authority which is consistent with applicable case law cited herein.

Accordingly, the Commissioner adopts as his own those findings and conclusions set forth in the initial decision.

It is further determined that the instant Petition of Appeal can be and is hereby dismissed.

COMMISSIONER OF EDUCATION

June 16, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6297-87
AGENCY DKT. NO. 275-8/87

P.W.M., on behalf of his minor child, P.M.M.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF MONTCLAIR, KURT L. WEINHEIMER, LOUISE BELLACE and RONALD KULIK,

Respondents.

P.W.M., pro se

Patti E. Russell, Esq., for respondents (McCarter & English, attorneys)

Record Closed: May 2, 1988 Decided: May 3, 1988

BEFORE: **WARD R. YOUNG, ALJ:**

This matter was opened by the filing of a Petition of Appeal with the Commissioner of Education on August 24, 1987, wherein the lawfulness of the physical education grading policy and propriety of procedures implementing same are challenged. Petitioner seeks a determination setting aside the policy; impropriety of grading procedures; an investigation by the Commissioner to take action against teachers and administrators associated with the process; action by the Board to prevent similar occurrences in the future; and grade adjustments for P.M.M. and other pupils.

Respondents aver that the grade adjustment sought was made and the present policy (revised) is consistent with law.

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The matter was transmitted to the Office of Administrative Law on September 16, 1987 as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing telephone conference was held on December 1, 1987 by the Honorable Ken R. Springer at which the matter was set down for hearing on May 2 and 3, 1988. The matter was then reassigned to me on April 27, 1988.

Respondents filed a Motion to Dismiss on April 27, 1988 for reasons of an untimely filing, laches, estoppel, mootness, and standing, or in the alternative for summary decision. Since the time allotted for responsive papers and optional reply pursuant to N.J.A.C. 1:1-12.2 extended beyond the scheduled hearing dates, the parties were directed to appear for oral argument on the Motion on May 2, 1988, to be followed by a plenary hearing if respondent did not prevail on Motion. The record closed on May 2, 1988 with the granting of respondent's Motion.

It is undisputed that this controversy was triggered when P.M.M. received a grade of "D" in physical education for the first quarter marking period in the 1985-86 school year, which resulted from tardiness in filing an excuse for absence as well as some absence due to unpreparedness.

The father of P.M.M. pursued the matter which resulted in a resolution of the grade dispute through the change of the first quarterly grade from "D" to "B." The final grade for P.M.M. in physical education for the 1985-86 school year was an "A." The grade resolution was effectuated no later than October 1986.

P.M.M. is currently a member of the senior class, and it was stipulated there are no 1986-87 or 1987-88 grades in dispute.

It was also stipulated that the controversy over P.M.M.'s first quarterly grade in 1985-86 triggered a review of the physical education grading policy and the revision of it. Respondents argue the revised policy is consistent with law, which is disputed by petitioner.

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N.J.A.C. 6:24-1.2(b) states:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education which is the subject of the requested contested case hearing.

The filing of the Petition of Appeal on August 24, 1987 would be deemed to be timely pursuant to N.J.A.C. 6:24-1.2(b) if the cause of action occurred on or after May 26, 1987. See, 1987 New Jersey Lawyers Diary and Manual.

I **FIND** the cause of action (the "D" grade received by P.M.M.) occurred in the Fall of 1985 and the filing of the instant matter on August 24, 1987 is in violation of N.J.A.C. 6:24-1.2(b) and warrant the granting of respondent's Motion to Dismiss. Riely v. Hunterdon Central High Board of Education, 173 N.J. Super. 109 (App. Div. 1980).

I further **FIND** the absence of a genuine dispute since P.M.M.'s 1985 grade controversy was resolved no later than October 1986.

I **CONCLUDE**, therefore, that respondent's **MOTION TO DISMISS** is **GRANTED**, and the Petition of Appeal shall be and is hereby **DISMISSED. IT IS SO ORDERED.**

I find no compelling reason to address respondent's dismissal arguments for laches, estoppel, mootness, or standing.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Commissioner Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

3 May 1988
DATE

WARD R. YOUNG, ALJ

5/10/88
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

MAY 10 1988
DATE

Mailed To Parties:

FOR OFFICE OF ADMINISTRATIVE LAW

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P.W.M., on behalf of his minor child, P.M.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTCLAIR ET AL., ESSEX COUNTY,	:	DECISION
RESPONDENTS.	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law.

It is observed that no exceptions to the initial decision were filed with the Commissioner by the parties pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

Upon review of the record, the Commissioner finds and determines that the ALJ properly concluded that the relief requested by petitioner herein is barred by the 90-day rule provision set forth in N.J.A.C. 6:24-1.2(b). The Commissioner adopts as his own those findings and conclusions set forth in the initial decision.

Accordingly, the Board's motion to dismiss the instant Petition of Appeal for the reasons set forth above is hereby granted.

COMMISSIONER OF EDUCATION

June 16, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7594-87
(EDU 2774-87 and EDU 2775-87
ON REMAND) CONSOLIDATED
AGENCY DKT. NOS. 73-4/87 and
59-4/87

BOARD OF EDUCATION OF PENNS GROVE-CARNEYS POINT REGIONAL SCHOOL DISTRICT,
Petitioner,
v.
BOARD OF EDUCATION OF TOWNSHIP OF OLDMANS AND BOARD OF EDUCATION OF BOROUGH OF WOODSTOWN,
Respondents.

ANN C. CHEVREUIL, et al.,
Petitioner,
v.
BOARDS OF EDUCATION OF TOWNSHIP OF OLDMANS AND OF PENNS GROVE-CARNEYS POINT REGIONAL SCHOOL DISTRICT,
Respondents.

Ann C. Chevreuil, petitioner, pro se

John P. Morris, Esq., for respondent Board of Education of Oldmans Township (Horuvitz, Perlow, Morris and Baker, attorneys)

Gary D. Wodlinger, Esq., for respondent Board of Education of Penns Grove-Carneys Point Regional School District (Lipman, Antonelli, Batt & Dunlap, attorneys)

Record Closed: April 25, 1988 Decided: May 5, 1988

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BEFORE NAOMI DOWER-LA BASTILLE, ALJ:

Petitioner, Ann C. Chevreuil, parent and resident of Oldmans Township (Oldmans), on her own behalf and for hundreds of participating parents, filed a complaint seeking to preserve past practice in Oldmans of permitting children to have a choice between attending the Woodstown and Penns Grove High Schools. Penns Grove-Carneys Point Regional High School (Penns Grove) filed a complaint against the Oldmans Board to compel the Board to send more of its high school students to Penns Grove, claiming violation of an implied sending-receiving contract or violation of allocations mandated by N.J.S.A. 18A:38-12. The Board of the Woodstown Borough School District, although named in the complaint, opted to take no position and waived appearance. The Commissioner of Education transmitted the consolidated matters to the Office of Administrative Law on April 27, 1987, as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

The procedural history of this case is related in my initial decision issued on September 30, 1987 in EDU 2774-87 and EDU 2775-87, consolidated. On November 12, 1987 the Commissioner issued his decision remanding the matter

> for further findings of fact and clarification as follows. Since the 1907 apportionment clearly delineated that the students who resided in Pedricktown attend Penns Grove High School and those who resided in Auburn attend Woodstown High School respectively, the Commissioner believes it is essential to a final determination of this matter that testimony be taken and evidence of proofs be adduced as to exactly what the precise geographic boundaries of Pedricktown and Auburn, as part of Oldmans Township, were in 1907.

The remand was transmitted to the Office of Administrative Law on November 18, 1987. On December 23, 1987, I directed the parties to perform research in January and exchange information in February to prepare for hearing on March 18, 1988 in Woodstown. A list of exhibits entered into evidence at the hearing is appended to this decision. The record closed on April 25, 1988 after allowance of a period to file briefs.

The Chevreuil parents filed a new motion for emergent relief prior to the hearing date, based on actions of all the party boards which placed new burdens on children applying to attend Woodstown High School's Vocational Agriculture Program (Vo-Ag) in September 1988. The parents sought to have all eighth grade Oldmans applicants to

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Woodstown High be permitted entrance either to the Vo-Ag program or the regular program. Only three Pedricktown area students had then applied for the regular program as "crossovers." I will address this interim issue after discussing the facts on remand.

THE "GEOGRAPHIC BOUNDARIES" OF PEDRICKTOWN AND AUBURN

The Chevreuil parents offered an 1879 map, which was the same map relied on by Oldmans, except that the Oldmans exhibit (2-O-13) is uncropped. The map shows the names and locations of the residents then situated in the township who were clustered in Pedricktown and Auburn. At that time, Oldmans had not yet become a separate township and was a part of Upper Penns Neck Township. The Chevreuil parents' map has been marked in red by the Mayor of Oldmans to show the current Township boundary and the locations of Pedricktown and Auburn. The Chevreuil group also offered a copy of a map dated November 1984 (2-CP-2) which is displayed on the wall of the Oldmans Board's meeting room. It shows no area specifically delineated as Pedricktown and Auburn (this name is simply written in). The Chevreuil group's last exhibit is a series of excerpts from the Oldman Board's minutes of 1907-09. The group contends that the minutes show that transfers between the two schools were commonly approved, i.e., that parents had "free choice" of schools. The minutes do show that in 1908-09 there were only seven Oldmans high school students: three at Woodstown and four at Penns Grove High. Upon close study, it appears that the minutes use the term "transfer" to refer to the initial transfer from a local grammar school to a high school rather than between the Woodstown and Penns Grove high schools.

The Oldmans Board produced an 1883 history of Salem County, which mentions the largest village, Pedricktown, with one hundred dwellings and Auburn, formerly known as Sculltown, with fifty dwellings. It relates the creation of Oldmans township in 1881. Pedricktown and Auburn were considered the only villages, and there were three "hamlets," each with a few houses. The Township was divided into five school districts at that time (1883): Auburn, Pedricktown, Literary, Brick and Perkintown. These pre-1900 schools are shown on Exhibit 2-O-8. All but the Auburn school were located in the northern part of the Township. By 1912, only the Pedricktown and Auburn schools were in use. The school registers from 1907-08 show the names of students at Perkintown and Pedricktown schools and some of their alleged residence locales, as determined with the assistance of the Salem County Historical Society. The Society's "Place Names" publication of 1964 (2-O-7) describes Auburn, Pedricktown, Perkintown and Five Points.

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Maurice Madden, administrative principal for Oldmans, testified that he outlined in yellow on the maps what he construed as the Woodstown High zone, based on what he learned about the way the districting was handled when he came to work for the Board in 1968. He learned the bus route by speaking with the drivers and the system by reading board minutes. He did not "put it in black and white" until 1977. The "zone" developed due to transportation needs and the existing road system. Madden admitted that "crossovers" had always been allowed but only with conditions, namely, that students had to get to the bus going to the other high school.

Oldmans also had its "unofficial historians," one of whom is a secretary for the Board, map the residences of high school students in 1943-44 (Exhibits 2-0-11 and 12) when the secretary herself attended Penns Grove High School. Those attending Woodstown High in 1943 were from the Auburn zone as drawn by Madden.

The undersigned ALJ also brought a map to be placed in evidence (Exhibit 2-C-1). This map, obtained from the County Planning Office, is a U.S. Geological survey of Oldmans as last revised in 1967. Structures are located on the map by means of aerial photographs. This map shows the clusters of houses in Auburn and Pedricktown which have been there since 1900 and also shows the extent of development in 1967. There has not been a great deal of development since those earlier years and the place names have remained the same.

I FIND:

1. There has never been an identifiable geographic boundary, by metes and bounds, for the villages of Pedricktown and Auburn.

2. In 1907, Pedricktown was not the area marked "Pedricktown P.O." on the 1876 maps, but was a village surrounding the intersection of the Pedricktown-Woodstown Road and the Pedricktown-Center Square Road (now the intersection of County Roads 602 and 642) and extending no more than about 1,500 feet from the intersection in any direction.

3. In 1907, Auburn was a village extending in a northeastern direction about 1,500 feet along the road toward Oldmans Creek from the intersection of the Auburn-Pennsville Road and two other roads going in a southwestern direction out of Auburn.

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4. The geographic boundaries of both Pedricktown and Auburn in 1907 are not very different from those which exist today.

5. Although Auburn is within the Woodstown High School "zone" as drawn by Madden in 1977, the area within those "zone" lines bears no relation to the geographic boundaries of Auburn in 1907, 1943 or today, but does appear to be the location of the Oldmans residences of Woodstown High Students in 1943-44 and of Auburn school district children in 1907 (See, Exhibit 2-0-9).

I do not apply these findings to make any conclusions because the Commissioner's remand directed that I make only findings. The arguments made by the Chevreuil parents who seek a specific conclusion can be found in their summation dated April 9, 1988 which is a part of this record.

THE INTERIM RELIEF ISSUE

On February 8, 1988, Chevreuil moved for emergency relief to assure that Oldmans eighth graders from the Pedricktown area who wish to attend Woodstown High School in the 1988-89 school year would be admitted, since a final order in this case could not be issued before April at the earliest. She also asked that such relief be granted for those opting to attend the Vocational Agriculture Program (Vo-Ag) at Woodstown. On February 17, Chevreuil advised me that the Oldmans Board was considering a new attendance policy, which included zones and requested that the Board be enjoined from changes pending results of litigation. She enclosed a form letter dated January 22, 1988, which was sent by Administrator Madden to parents who requested attendance at Woodstown High for their children.

Madden's letter stated: "The Vo-Ag Program question is still up for debate and scrutiny, since Woodstown High School will not admit anyone who has not met the approval of the regular receiving district (in this case, Penns Grove)." On February 23, I received additional documents from a Chevreuil group parent (Mrs. Pennie Johnston). Included was a letter from Madden dated December 4, 1987 in response to her request for her child to attend the Vo-Ag Program at Woodstown. He stated:

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> As you are aware there are two barriers that need to be cleared meantime:
>
> 1. The attendance line court case has one more hearing in December or January
>
> 2. The PRACTICE of Woodstown High School requiring K-8 districts to get permission of the K-12 high school district to release the child.
>
> Action on your letter has been tabled until the Court case has been decided by the Commissioner of Education.

On January 22, 1988, Madden had written to the same parent:

> The VO-Ag. Program question is still up for debate and scrutiny, since Woodstown High School will not admit anyone who has not met the approval of the regular receiving District (in this case Penns Grove).
>
> You may wish to consider a letter of request, plus an appearance at a Penns Grove High School Board meeting, to begin that process with the Penns Grove District. They have already denied or ignored the request for Theresa Hill in August or September. However, your requests may be timely enough for the Penns Grove Board to give more serious attention.

On February 1, the parent applied to the Penns Grove/Carneys Point Board as directed. She was at first advised that she needed a letter of acceptance from Woodstown High, and was later told that her request would be considered at a meeting on February 16, 1988. The Penns Grove Board denied the request on March 9, 1988.

As a result of the motions and new developments brought to my attention by the Chevreuil parents, I advised the parties on February 25 that I would decide the motions on March 18, the hearing date, since counseling on choice of schools would not conclude until March 25. I was, however, very much concerned with the treatment of Vo-Ag parents because they were being given contradictory directives, one of which was that Penns Grove—which had an interest in claiming their attendance—was authorized to grant or deny their application. On February 26, 1988, I ordered both Boards to show cause why they should not be required to advise the Woodstown High School that it is the receiving district for Oldmans' Vo-Ag students and that the Oldmans Board has approved or disapproved the payment of tuition for the Oldmans applicants. I also gave notice by order that the results of this case on Vo-Ag applications would become one of the issues. I ordered Madden to cease and desist advising any person that Penns Grove is the receiving district for Oldmans' Vo-Ag applicants.

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At the hearing, the Chevreuil group brought in a new form: "Request for Attendance at a Special High School Course of Study," which purportedly reflected the new policy adopted by Oldmans (Exhibit 2-0-5) about which the Chevreuil parents complained. I have marked the new form a court's exhibit because it may be pertinent to a full review of the issue of treatment of the Vo-Ag students.

At the time of the hearing on March 18, three eighth grade Oldmans students from the Pedricktown area had requested registration in the general course at Woodstown High and four sought registration in the Vo-Ag program, but registration and counseling sessions were not yet completed. The Chevreuil group argued that a final order in this matter could not be expected before June or July and noted the hardship on current eighth graders, who needed to know which high school they were to attend in September. Some parents were considering private school as an option and would need to know as soon as possible. Finally, it is obvious that both schools should know how many students to expect. Penns Grove argued that if these eighth graders were permitted to go to Woodstown, the Board would lose tuition monies and it renewed a request that it should be awarded tuition monies to compensate the district for lost revenue. The Oldmans Board did not oppose emergency relief.

I requested that Oldmans present a final count of eighth graders seeking Woodstown High enrollment by April 10. The final count was four "crossovers" seeking enrollment in the general program and three seeking Vo-Ag enrollment. The facts are not in dispute.

FINDINGS ON INTERIM RELIEF

6. A final order in this case may not be issued until late June and, depending on the decision, an appeal is possible.

7. Both the parents and the seven children seeking to enter Woodstown High in September 1988 need to know where they are to be enrolled and whether they must make alternative plans.

8. The districts need to know how many children to expect and need time to complete high school scheduling for them.

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9. Oldmans has approved the requests of the applicants for the Vo-Ag program at Woodstown High.

I FIND that immediate and irreparable harm will result if these children are not approved for registration in Woodstown High at this time and that approval would simply maintain the status quo until a final determination is made by the Commissioner. There is no issue as to the merits with respect to the Vo-Ag program applicants, since no party argues that Oldmans students should not be allowed to go to Woodstown. As to the four "crossovers," they are de minimis in number. The tuition Penns Grove would lose is not a weighty factor. Penns Grove does not have a vested right to receive these tuition monies and has not received them in the past. The statutory scheme was not intended to create a revenue source for districts. Bd. of Ed. of Cranbury v. Bd. of Ed. of Lawrence, (N.J. State Board of Ed., Apr. 1, 1987, 95-85) (unreported), at 14. I CONCLUDE that all seven eighth graders should be permitted to attend Woodstown High beginning in September 1988.

THE VO-AG PROGRAM APPLICANTS

Oldmans has been sending its Vo-Ag students to Woodstown High pursuant to the authority of N.J.S.A. 18A:38-15:

> 18A:38-15. Attendance at special high school courses of study in another district
>
> Any board of education not furnishing instruction in a particular high school course of study, which any pupil resident in the district and who has completed the elementary course of study provided therein may desire to pursue, may, in its discretion, pay the tuition of such pupil for instruction in such course of study in a high school of another district.

Penns Grove does not offer a Vo-Ag program, and it argued, since the program takes up only about two hours in a school day, that Oldmans students in the Penns Grove zone (if a zone allocation is accepted) could simply be bussed to Woodstown and back to obtain that course of study. Alternatively, Penns Grove might itself establish a Vo-Ag program. The Boards even suggested that the Salem District might initiate a Vo-Ag program and provide an alternative. (Salem High is much further away and is widely regarded among county residents as educationally inferior to Woodstown.)

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Penns Grove's argument must be rejected because the statute gives it no standing on the subject. N.J.S.A. 18A:38-15 makes it very clear that the Board of Education in which the pupil is resident alone has the discretion to approve or disapprove attendance via payment of tuition. For the same reason, the procedure recently devised by Oldmans administrator Maurice Madden, in conjunction with the Penns Grove Board and with the cooperation of the Woodstown High administration, is improper and is contrary to the statute. That procedure, which Madden implemented apparently without official Board sanction, seemed designed to prevent or discourage Pedricktown area students from attending the Vo-Ag program at Woodstown. The facts were discussed at the hearing and were undisputed. They were evidenced by letters whose authenticity was not questioned.

I FIND:

10. While this case was pending, after the remand, Madden advised Oldmans parents and the Woodstown administration that, according to the Board's zone policy, Penns Grove was the receiving district for Oldmans Vo-Ag students within the northwestern area of town.

11. Woodstown High has a policy of requesting approval of the district to which students would ordinarily be received or assigned as a condition of accepting them to its Vo-Ag program.

12. Woodstown High and Madden advised Oldmans parents within the Penns Grove "zone" that they had to obtain the approval of the Penns Grove Board to attend the Vo-Ag program at Woodstown High.

13. At least one, and possibly two, additional Oldmans students were denied Vo-Ag approval by the Penns Grove Board prior to the March 18 hearing date.

14. In the 1987-88 school year, while this case was pending, the Oldmans Board adopted a new attendance policy (exhibit 2-O-5) and its administrator devised a form entitled "Request Form for Attendance at a Special High School Course of Study" (Exhibit 2-C-2).

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15. Under the new policy, Vo-Ag students and parents would have to acknowledge in writing that a student may be transferred out of the school requested for Vo-Ag if he or she failed to satisfactorily complete or comply with the special program, and that if Penns Grove initiates a Vo-Ag program, an eighth grade student who would have attended that school would have to be enrolled in its Vo-Ag program.

16. The form does not accurately reflect the policy, since it requires parents to sign what is virtually a contract specifying that the Vo-Ag student can be transferred from Woodstown High to Penns Grove High at any time in the school year.

The Chevreuil parents complain that the policy is unprecedented and arbitrary. That issue will not be decided here. Since the statute gives the Oldmans Board discretion to approve or disapprove tuition payment, the issue should be decided if and when the Board denies Vo-Ag attendance to an applicant. Parenthetically, the Board certainly has a right to ensure that an applicant genuinely wants a Vo-Ag program, but the parents should not be made to sign what looks to them like a contract, because that action suggests that they have no right of appeal and it does not seem educationally sound to constrain a change in program by requiring that it be accompanied by a change in school. This seems antithetical to the function of guidance special services. It may be that the policy will develop differently after the results of this case are known. I do **FIND** and **CONCLUDE**, however, that the form developed is inconsistent with the adopted policy, is misleading and should be revised.

The final issue concerns whether or not Vo-Ag students should be counted in allocations to Woodstown High in the event numerical rather than geographical allocation is ordered by the Commissioner. On that issue I agree with the Oldmans Board's position and **CONCLUDE** that students who attend an out-of-district high school pursuant to the authority of N.J.S.A. 18A:38-15 should not be counted under an N.J.S.A. 18A:38-12 allocation because the statutory authorization distinguishes these classes of students. Adopting Penns Grove's position would also make numerical allocation even more difficult to effectuate since the general course students attending Woodstown High could not be known until all the special program students had enrolled. There would be a "bumping" procedure which would be most divisive and conducive to uncertainty: four Vo-Ag applicants approved in April or May would reduce the number of positions available for

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general course students. Numerical allocations are difficult to administrate, as can be seen by the number of appeals involving the Asbury Park District. I thus **CONCLUDE** that Vo-Ag students should not be counted in any numerical allocation.

It is therefore **ORDERED** that the requested findings on remand supplement the record;

that the seven Oldmans eighth graders who have applied as either Vo-Ag program or general program "crossovers" be approved for attendance at Woodstown High;

that the Vo-Ag students not be included in numerical allocations to Woodstown High; and

that the Oldmans Board revise its special program application consistent with this determination.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

May 5, 1988
DATE

Naomi Dower-La Bastille
NAOMI DOWER-LA BASTILLE, ALJ

Receipt Acknowledged:

5-6-88
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

MAY 10 1988
DATE

Ronald L. Parks
OFFICE OF ADMINISTRATIVE LAW

bc/ee

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BOARD OF EDUCATION OF THE PENNS GROVE-CARNEYS POINT REGIONAL SCHOOL DISTRICT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARDS OF EDUCATION OF THE TOWNSHIP OF OLDMANS AND THE BOROUGH OF WOODSTOWN, SALEM COUNTY,	:	DECISION ON REMAND
RESPONDENTS.	:	
ANN C. CHEVREUIL ET AL.,	:	
PETITIONERS,	:	
V.	:	
BOARDS OF EDUCATION OF THE TOWNSHIP OF OLDMANS AND THE SCHOOL DISTRICT OF PENNS GROVE-CARNEYS POINT REGIONAL, SALEM COUNTY,	:	
RESPONDENTS.	:	

The record and initial decision on remand rendered by the Office of Administrative Law have been reviewed. Respondent Board of Education of Oldmans Township and respondent Board of Education of Penns Grove-Carneys Point Regional School District filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

The Oldmans Township Board of Education (hereinafter Oldmans Board) comments, in regard to the ALJ's Finding of Fact No. 5, that "[w]hile there might not be 'precise' geographical boundaries, such as to be identifiable 'by metes and bounds' (Finding No. 1, Initial Decision at p. 4), the issue does not deal with real estate law but rather apportionment and allocation of students within a district.***" (Oldmans Board's Exceptions, at pp. 1-2) It avers that a review of Exhibits 2-0-9 and 2-0-10, the 1907-08 registers and maps, establish that "the children who attended the Auburn Elementary School and the Pedricktown Elementary Schools did not all live within the confines of the villages. However, those students did attend either the Auburn or the Pedricktown Elementary School and, the Oldmans Board of Education in determining where Auburn students and Pedricktown students would attend high school understood that.***" (Exceptions, at p. 2)

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Relying on its letter brief of April 14, 1988, the Oldmans Board claims that the action of the Oldmans Board in 1907 constitutes a resolution sufficient to permit its continuation up to the present as reflected in the 1977 Board Policy now revised and appearing as Exhibit 2-0-5, and the attendance zones as drafted by Mr. Madden, administrative principal for Oldmans, as of 1977.

Moreover, the Oldmans Board claims that since the ALJ found that

> the "zone as drawn by Madden in 1977 ... does appear to be the location ... of Woodstown High students in 1943-44", such would be "the actual allocation and apportionment of pupils among said high schools in effect in [1943-44]", as seemingly required by N.J.S.A. 18A:38-12 -- even if one were to assume that the 1907 resolution of the Board was not sufficient to constitute a resolution authorizing allocation and apportionment prior to the 1943-44 academic year. (Exceptions, at p. 2)

The Oldmans Board claims further that while not a "metes and bounds" description, the 1977 map juxtaposed with the 1907-08 elementary school residences and the actual 1943-44 high school student residences "is sufficient to constitute a geographical apportionment between the two high school districts rather than having to rely on some numerical allocation." (Exceptions, at p. 2)

Concerning the Vo-Ag students, the Oldmans' Board states, Judge LaBastille's disagreement with the Oldmans form (Exhibit No. 2-C-2) and the Oldmans Board Policy (Exhibit 2-0-5) may, in one small respect, be correct. Since the Oldmans Board's revised policy was redrafted thereafter, there is some discrepancy between Board policy and the Board form.

> [A]s reflected at the Oldmans Board Policy, a student may be subject to reassignment if he/she does not satisfactorily comply with the vo-ag (or special course of study) requirements. In that event, the Oldmans Board of Education, pursuant to its authority as found at N.J.S.A. 18A:38-15, may, in its discretion, determine whether that child should be reassigned. To rectify that slight inconsistency, also attached hereto is a re-drafted form for use by the Oldmans Board of Education, parents and students who wish to enter into a special course of study. It is respectfully requested that you likewise review this form so as to approve it, along with the present day revised Board Policy found at Exhibit 2-0-5. (Exceptions, at p. 3)

Relying on its post-hearing submission dated April 14, 1988, which is incorporated herein by reference, the Board of

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Education of Penns Grove-Carneys Point (hereinafter Penns Grove), avers that "the now nine students that have been permitted to cross over and attend Woodstown is not de minimis and any final determination should provide a remedy for Penns Grove to make up for the loss of these students consistent with the prior arguments made by [it] in this matter." (Penns Grove's Exceptions, at p. 1)

Concerning the Vo-Ag students, Penns Grove takes exception with the ALJ's determination on page ten wherein she agrees with the Oldmans Board's position that those students who attend an out-of-district school pursuant to N.J.S.A. 18A:38-15 should not be counted under a N.J.S.A. 18A:38-12 allocation because the statutory authorization distinguishes that class of students.

> The language in N.J.S.A. 18A:38-12 is mandatory. Accordingly, the statute mandates that the allocation and apportionment of students shall be 79% to Penns Grove and 21% to Woodstown. No matter how many students Oldmans in its statutory discretion under N.J.S.A. 18A:38-15 allows to go to Woodstown to the Vo Ag program the total allocation of apportionment for any given year should and still must be 79% to Penns Grove-Carneys Point and 21% to Woodstown. Any other result would be inconsistent with the mandatory language of the statute. The Penns Grove-Carneys Point Board of Education does not agree with Judge LaBastille's determination that such a result would be difficult to administer. Frankly, the administration of that issue with proper time frame set for the enrollment of the students appears to be quite a simple matter and one that can be established by the simple creation of an appropriate policy with respect to the issue to allow for the orderly management of the enrollment of the students.
>
> (Exceptions, at p. 2)

Additionally, Penns Grove believes that

> it should be provided with an annual accounting from the Oldmans Township Board of Education as to the enrollment of its students consistent with whatever Order is finally entered in this matter so as to be in a position to properly monitor the compliance with same so as to avoid the problems that have occurred in the past. (Id.)

Upon his careful and independent review of the record of this matter, the Commissioner reverses in part and adopts in part the initial decision and the initial decision on remand rendered by the Office of Administrative Law for the reasons that follow.

As a result of the Commissioner's remand of this matter, it is now plain that "[t]here has never been an identifiable geographic

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boundary, by metes and bounds, for the villages of Pedricktown and Auburn." (Initial Decision on Remand, ante) Based on this information, the ALJ concluded, and the Commissioner concurs, that

> 5. Although Auburn is within the Woodstown High School "zone" as drawn by Madden in 1977, the area within those "zone" lines bears no relation to the geographic boundaries of Auburn in 1907, 1943 or today, but does appear to be the location of the Oldmans residences of Woodstown High Students in 1943-44 and of Auburn school district children in 1907 (See, Exhibit 2-O-9).
> (Initial Decision on Remand, ante)

Thus, while the minutes of the Oldmans Board at its meeting in September 1907 established that its elementary students from the Auburn area would attend Woodstown High School while those students from Pedricktown would attend Penns Grove High School, any argument that high school allocation and apportionment for these communities should be based purely on geographic community boundaries must fail. What understanding the Oldmans Board of 1907 held as to what area comprised Auburn and what area comprised Pedricktown will remain lost in the annals of time. However, it is clear from the exhibits and testimony adduced at the hearing on remand, that the bus routes established sometime after 1907 have remained constant and, in a rough sense, delineate the local understanding of where the communities in question start and stop for school attendance purposes.

Thus, because it is apparently impossible to establish firm and distinct geographical boundaries for the communities in question as of 1907, 1943-44 or currently, the Commissioner therefore determines that attendance areas for pupil attendance at Penns Grove High School versus Woodstown High School from the communities in question shall be according to geographic road boundaries as reflected in the 1977 Board policy now revised and appearing as Exhibit 2-O-5, but without regard to ratios or specific numerical apportionment.

In this way, to the greatest extent possible, the status quo as of 1943-44 shall have been preserved. In this regard, the Commissioner affirms the initial decision in this case dated September 30, 1987 wherein the ALJ suggested:

> Since Oldmans sent its student to two high schools outside the district prior to the adoption of N.J.S.A. 18A:38-12 (L. 1944 c. 210) and did not pass a resolution prior to that time, I CONCLUDE the actual 1943-1944 allocation must be continued. If the Oldmans Board wishes to change its designation of high schools or the allocation, it can only do so pursuant to the procedures mandated by N.J.S.A. 18A:38-13 and 14.
> (at p. 12)

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Moreover, the Commissioner is in accord with the ALJ that the Chevreuil group parents cannot be granted "freedom of choice" if their residence does not conform to Policy #2120 for the reasons expressed in the initial decision at pages 12-13. See Board of Education of Asbury Park v. Board of Education of Belmar and Board of Education of Manasquan, 1967 S.L.D. 275 (Asbury Park I) and Board of Education of Asbury Park v. Board of Education of Belmar and Board of Education of Manasquan, 1979 S.L.D. 308 (Asbury Park II).

In agreeing with the ALJ that the existing policy and practice of Oldmans Township granting "cross-over" privileges is proscribed by N.J.S.A. 18A:38-12, and as followed in Asbury Park, supra, the Commissioner finds and determines that the manner in which the Oldmans Board shall determine which pupils it will assign to Penns Grove to fill the entitlement shall not, however, be based on ratios or number of pupils but rather shall be in accord with Policy #2120 as revised February 1988, insofar as it assigns in subsection A which students shall attend Woodstown High School and which shall attend Penns Grove High School as follows:

A. As to general high school courses of study:

1. All students residing in the eastern portion of the Township bounded by bus route #1 east of Route 295 (beginning at the access road or lane to the Township Dump on Auburn Road) shall attend Woodstown High School,

2. Those students residing in the remaining portion of the Township shall attend Penns Grove High School.

(Exhibit 2-O-5)

Said conclusion renders the issues resolved concerning not only "free-choice" but also additional bussing or numerical apportionment for those students electing to attend other than their assigned school. No additional busses appear to be needed under Policy #2120 inasmuch as "cross-overs" hereafter shall be disallowed.

Further, the Commissioner directs that the boundaries determined pursuant to the above policy be drawn on a map and officially adopted.

Moreover, regarding the ALJ's conclusion concerning the interim relief request of petitioners, the Commissioner rejects the finding of the ALJ that immediate and irreparable harm will result if the four children requesting cross-over enrollment for general programming at Woodstown High School for the 1988-89 school year are denied that approval. On the contrary, under Crowe v. De Gioia, 90 N.J. 126 (1982), which established the standard for pendente lite restraints, petitioners have failed to prove irreparable harm, since the children will be provided a thorough and efficient education whether they attend the school which is properly designated to

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receive them at the high school level, that is, Penns Grove-Carneys Point, or at Woodstown. Moreover, petitioners fail to present a prima facie case on the likelihood of prevailing on the merits of this matter since N.J.S.A. 18A:38-12 is dispositive of the argument that the children are required by law to attend according to the delineations established during the 1943-44 school year, thus negating their "free-choice" argument. Finally, in balancing the equities of the matter, the third prong of the Crowe v. De Gioia standard, petitioners have failed to convince the Commissioner that notice of the possibility of their children's attending Penns Grove was inadequate. Even as this decision issues, a number of months remain before the start of the next school year, adequate time to adjust or to make any alternative plans the parents deem necessary. Moreover, the number of students requesting "cross-over" for general studies at this point is nominal, four. Nearly three months is adequate time, too, for the districts to "know how many children to expect and *** time to complete high school scheduling for them." (Initial Decision on Remand, at p. 7) Accordingly, interim relief is denied as to the requests for cross-over permission for the four general program students.

In so concluding, the Commissioner would distinguish the ALJ's reliance upon Board of Education of the Township of Cranbury v. Board of Education of the Township of Lawrence, decided by the Commissioner September 30, 1985, rev'd State Bd. April 1, 1987 (appeal pending, Appellate Division) for the proposition that the "statutory scheme was not intended to create a revenue source for districts." (Initial Decision on Remand, at p. 8) While it is true that the statutory scheme for withdrawing from a sending-receiving relationship pursuant to N.J.S.A. 18A:38-13 et seq. was not intended to create a revenue source for districts, withdrawal from a sending-receiving relationship is not the issue in this matter. Rather, the point is that Penns Grove is entitled by law to receive the students from Oldmans Township as a result of the apportionment and allocation extant during the 1943-44 school year, pursuant to N.J.S.A. 18A:38-12. See also, Asbury Park, supra. Thus, Cranbury is inapposite in determining whether cross-overs should be allowed and, therefore, the conclusion of the ALJ in this regard is rejected.

With respect to the Vo-Ag students mentioned in the Order granting interim relief, the Commissioner adopts the findings and conclusion of the ALJ in establishing that N.J.S.A. 18A:38-15, not N.J.S.A. 18A:38-12, governs students' attendance at an out-of-district high school. Additionally, because the Commissioner has in this decision expressly proscribed allocating students on the basis of ratios but, instead, determined the distribution of students to the two high schools in question on the basis of geographic and bus boundaries, the issue Penns Grove raises asking for Vo-Ag student apportionment despite its having no such program is laid to rest. Thus, the Commissioner dismisses the issue of Vo-Ag student allocation to Penns Grove as moot, particularly since no student requesting admittance to the Vo-Ag program at Woodstown has been denied attendance there.

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Finally, concerning Penns Grove's alternate argument that it receive Vo-Ag students for all but the two hours requisite for participation in that specialized program, the Commissioner finds this position untenable. Because the number of students requesting the Vo-Ag program is small, the impact upon Penns Grove in claiming such students on a part-time basis is de minimus. Moreover, in the interests of the students, the Commissioner is convinced that such pupils' educational preference should be facilitated, assuming the Board's consent to pay the tuition for participation in such program pursuant to N.J.S.A. 18A:38-15, without the disruption that would result from their having to be transported to two separate facilities twice a day. Moreover, the Commissioner agrees with the ALJ that the language of the second revised policy as drafted by Mr. Madden concerning Vo-Ag students' attendance at Woodstown's Vo-Ag program is prematurely raised. As noted by the ALJ:

> [S]ince the statute gives the Oldmans Board discretion to approve or disapprove tuition payment, the issue should be decided if and when the Board denies Vo-Ag attendance to an applicant. (Initial Decision on Remand, ante)

Accordingly, the initial decision on remand, and the initial decision dated September 30, 1987, are adopted in part and rejected in part. The initial decision dated September 30, 1987 is adopted in that it denies "free choice" to parents wishing to cross-over their children to Woodstown High School, but it is rejected in apportioning pupils on the basis of ratio. Instead, such apportionment shall be established upon geographic road boundaries, as set forth in Policy #2120 (Exhibit 2-0-5), subsection A. The bussing issue raised herein and numerical apportionment are, thus, deemed moot. The findings of the ALJ on interim relief concerning the cross-over general attendance students are reversed, affirmed as to the Vo-Ag program students, for the reasons stated herein.

In all other respects, the initial decision on remand is affirmed for the reasons expressed therein.

COMMISSIONER OF EDUCATION

June 17, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6383-87
AGENCY DKT. NO. 252-8/87

OLD BRIDGE TOWNSHIP
BOARD OF EDUCATION,
Petitioner,
v.
WILLIAM T. WAGNER,
Respondent.

Frank M. Ciuffani, Esq., for petitioner (Wilentz, Goldman & Spitzer, attorneys)

Sanford R. Oxfeld, Esq., for respondent (Oxfeld, Cohen, Blunda, Friedman, LeVine & Brooks, attorneys)

Record Closed: March 1, 1988 Decided: May 16, 1988

BEFORE DANIEL B. MC KEOWN, ALJ:

INTRODUCTION

Six charges of conduct unbecoming a teacher were certified to the Commissioner of Education on August 3, 1987 by the Old Bridge Township Board of Education (Board) against William T. Wagner (respondent), a teacher in its employ for 16 years. The Board simultaneously suspended respondent from his teaching duties without pay under N.J.S.A. 18A:6-14. On January 19, 1988, an arbitrator ruled that the Board was obligated under its agreement with the Old Bridge Township Education Association of which respondent is a member to pay respondent an amount equal to the 120 day salary withheld during his suspension without pay, plus interest at one percent per month. Respondent's suspension continued with pay pending disposition of the matter.

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Respondent denies specific conduct underlying each charge and, while admitting certain conduct, he contends the conduct he admits is professionally acceptable. Respondent denies he engaged in conduct unbecoming a teacher; he demands that the charges be dismissed; and, he demands that he be immediately reinstated to his teaching duties and with all benefits and emoluments of employment otherwise denied him by the Board. The Commissioner transferred the matter on September 21, 1987 to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq.

After a prehearing conference was conducted on October 9, 1987, respondent filed a motion to compel the production of school records of certain pupils who were to testify against him at hearing. The Board opposed the motion and simultaneously moved to strike respondent's first separate defense regarding the timeliness under law of its certification of the charges. Respondent's motion to compel the production of school records of certain pupils was denied by written ruling dated December 29, 1987. A ruling on the Board's motion to strike respondent's first separate defense was reserved pending respondent's reply at the commencement of the plenary hearing on January 12, 1988 at the Borough of Metuchen Municipal Court, Metuchen. Having heard the reply on the record, the Board's motion to strike was granted on the grounds that the 45 day time period under N.J.S.A. 18A:6-13 within which the charges had to be certified did not expire until on or about August 13, 1987. The charges, having been certified on August 3, 1987 and received in the Commissioner's office on August 7, 1987, are timely filed.

The hearing continued three consecutive days until its conclusion January 14, 1988. The parties were granted time to file briefs in support of their respective positions. The record closed March 1, 1988. The preparation and issuance of this initial decision was delayed beyond 45 days from the date the record closed due to illness.

GENERAL BACKGROUND and CHARGES

The following general background facts are not in dispute between the parties. Respondent has been employed as a teacher of health and physical education at the Board's Madison Central high school for the past 16 years. He has acquired a master's degree, plus 30 graduate credits. During his employment with the Board, respondent was

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the head coach of the high school coed winter track team and served the Board in various capacities regarding extracurricular activities. Respondent has never had a salary nor salary adjustment increment withheld, nor has he ever been disciplined by the Board for any reason at any time. A review of the evaluations of respondent's teaching performance (R-5, A-O), his coaching performance (R-6, A-F), and letters of commendation (R-4, A-J) issued him by the high school principal, Peter M. Delaney, portray a teacher who is an effective teacher and well-liked by pupils.

Respondent and his wife have two children, ages three and one-half years and seven months. Respondent's wife is also a teacher of mathematics employed by the Board at the Madison Central high school, the same facility to which respondent is assigned. Respondent is also the father of three older children from a former marriage.

On November 25, 1986, principal Delaney called respondent to his office regarding complaints received from two female pupils, D.W. and C.M. The pupils alleged respondent was making improper physical contact with them. Following this meeting there was at least one more meeting on December 10, 1986 in the principal's office among the principal, respondent, vice principal Joseph L. Sweeney, vice principal O'Donnell, D.W. and high school social worker Sue Huslage. In anticipation of this meeting D.W. prepared two separate writings (P-2 and P-3) upon the recommendation of social worker Huslage. Respondent read both writings in the presence of all who were in attendance. After the meeting principal Delaney advised respondent that if the superintendent agreed, the complaints against him would be resolved by issuing him a written reprimand upon the condition he immediately resign from being head coach of the coed winter track team. Respondent agreed and he tendered his resignation as head coach.

The superintendent did not accept the principal's resolution of the matter. Rather the superintendent suspended respondent from all duties of employment, with pay, pending a further investigation into the matter. The New Jersey Department of Human Services, Division of Youth and Family Services (DYFS) was contacted as required under N.J.S.A. 9:6-8.11 to investigate the allegation against respondent, particularly the allegation made by D.W. A primary role of DYFS in such matters is to determine whether child abuse or neglect is involved.

On or about February 20, 1987 the superintendent received a report from DYFS which concluded its investigation did not substantiate an allegation of sexual abuse.

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In the meantime, the superintendent directed principal Delaney to continue interviewing pupils who were on respondent's winter track team. Members of Board counsel's law firm participated in the continuing investigation at the Board's direction. On or about June 16, 1987 the superintendent filed with the Board secretary a statement of charges and a statement of evidence executed under oath against respondent. The charges are reproduced here in full:

Charge 1

In or about the last week of November 1987, [respondent], made improper physical contact with, and improper verbal comments to, a sophomore female student, [C.M.], by approaching [C.M.] from behind, placing his hand upon [C.M.'s] buttocks and commenting that she looked "nice in pants". [Respondent's] physical contact and verbal comment constitutes conduct unbecoming a teaching staff member employed by the Board to teach coeducational physical education and to coach interscholastic track and field at Madison Central High School.

Charge 2

On or about November 24, 1986, [respondent] improperly made physical contact with a female student, [D.W.], by patting [D.W.] on the buttocks, and thereafter while in his office, hugging [D.W.] and kissing her on the mouth. [Respondent's] conduct on November 24, 1986, constitutes conducting unbecoming a teaching staff member employed by the Board to teach coeducational physical education and to coach interscholastic track and field at Madison Central High School.

Charge 3

Commencing in or about the end of the 1985-1986 school year and continuing through the Fall of 1986, [respondent] made improper physical contact with [J.T.], a female student by repeatedly patting [J.T.] on the buttocks and placing his arms about her shoulders and pulling her close to him in a hugging fashion. Such improper physical contact constitutes conduct unbecoming a teaching staff member employed by the Board to teach coeducational physical education and to coach interscholastic track and field at Madison Central High School.

Charge 4

During the course of the 1985-1986 school year [respondent] made improper physical contact with a female student [L.C.], by repeatedly hugging [L.C.] around the shoulders and pulling her close to him. Such improper physical contact constitutes conduct unbecoming a teaching staff member employed by the Board to teach coeducational physical education and to coach interscholastic track and field at Madison Central High School.

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Charge 5

During the course of the 1984-1985 and the 1985-1986 school years, [respondent] made improper physical contact with a female student, [M.M.], on several occasions by touching and patting [M.M.] on the buttocks and by placing his arms about her shoulders and hugging her. Such improper physical contact constitutes conduct unbecoming a teaching staff member employed by the Board to teach coeducational physical education and to coach interscholastic track and field at Madison Central High School.

Charge 6

During the course of the 1986 spring track season, which extends from March 1986 through May 1986, [respondent] while at track and field practice in the presence of a female student, [L.C.], made an improper verbal remark respecting the "size of a girl's chest" who was practice hurdling at the time. Such improper comment constitutes conduct unbecoming a teaching staff member employed by the Board to teach coeducational physical education and to coach interscholastic track and field at Madison Central High School.

The charges, together with the written statement of evidence, were served upon respondent on or about June 17, 1987. Respondent filed with the Board on or about July 3, 1987 a sworn statement of evidence in opposition to the charges. The Board, at a meeting conducted August 3, 1987, determined that "* * * such charges and the evidence submitted in support thereof, are sufficient, if true in fact to warrant the dismissal of [respondent] or a reduction in his salary* * *." (Certification of Determination). The Board also adopted a resolution by which respondent was suspended without pay under the provisions of N.J.S.A. 18A:6-14.

This concludes a recitation of the general background facts of the matter not in dispute. The respective proofs of the parties shall be presented, followed by findings of fact, legal analysis and conclusions. Initially, however, proofs shall address several meetings of respondent and school administrators which occurred during November and December 1986. Thereafter, the evidence regarding the specific charges shall then be addressed.

PROOFS OF THE PARTIES

Dr. Delaney testified that on November 24, 1986 he received a telephone call at home during the evening from another teacher who advised that a parent was complaining

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of respondent's alleged inappropriate remarks to her daughter, C.A.M., and that he was patting her daughter on her buttocks. The following day the principal contacted the parent and advised that he would talk with her daughter, which he did. The daughter, C.A.M., told the principal and vice principal Joseph Sweeney that respondent told her she "looks nice in pants", and she is "very pretty" and, on one occasion, he patted her on the "rear end". Delaney testified that C.A.M. explained that her school friend, D.W., witnessed the foregoing incidents.

Dr. Delaney called D.W. to the office to discuss the matter with her. He testified that D.W. denied witnessing any incidents between respondent and C.A.M. but said that respondent had patted her, D.W., on her buttocks. D.W. then refused to speak further on the matter.

Thereafter, Dr. Delaney called respondent to his office and advised him of the claims of C.A.M. and D.W. Delaney's recollection of respondent's reaction is that he did not recall patting anyone, although he admitted being "affectionate" with students without intending to be offensive. Delaney testified he pointed out to respondent that students perceive things differently than what may be intended. Delaney then called the mother of C.A.M. and told her he felt the matter was resolved because if, in fact, respondent had done anything untoward to her daughter such conduct would not be repeated.

Nothing further occurred and as far as principal Delaney was concerned the matter was closed until sometime on December 5, 1986 when he received another report from a different teacher. The teacher reported to Delaney that D.W. was extremely depressed and very upset in the classroom and that the teacher became very concerned about her. D.W. was brought to the office but would not discuss the cause of her upset with principal Delaney. Delaney described D.W. as very distraught and emotionally upset. D.W. agreed to talk with the school social worker, Ms. Huslage.

D.W. explained to Ms. Huslage that the cause of her upset was respondent's conduct as alleged in Charge 2. Ms. Huslage arranged to have a meeting with D.W., respondent, herself, principal Delaney and the two vice principals so that D.W. could resolve whatever problems she had with respondent.

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When Ms. Huslage reported to Delaney what D.W. had told her regarding respondent's conduct, Delaney called respondent to his office. Mr. Sweeney was present and Delaney advised respondent what D.W. was now accusing him of having done. Specifically, Delaney testified that "I had told [respondent] that [D.W.] had said he hugged her and attempted to kiss her or something to that effect." (1T-45). In response, Delaney testified that respondent's concern was to keep the matter in-house. While respondent did not admit engaging in the alleged conduct, he expressed concern regarding his wife, who teaches in the same school building, as well as his mother-in-law who works in the schoolhouse. Respondent did not want the matter to go beyond the principal's office. Respondent did express shock by the allegations, though he neither admitted nor denied the charges. Delaney advised respondent the matter would be investigated further and that he would meet with him again the following Monday, December 8, 1986. In the meantime, Ms. Huslage advised Delaney that the alleged conduct of respondent towards D.W. had, according to D.W., caused her to recall a situation in which she was assertedly sexually abused when she was younger and that that recollection was causing D.W. anxiety. Ms. Huslage told Delaney that she advised D.W. to write out her feelings of what respondent was to have done to her and of her recollection of the past event.

The meeting scheduled for Monday, December 8, 1986 was held December 10, 1986 and attended by respondent, Delaney, Ms. Huslage, D.W., and vice principal Joseph Sweeney. Prior to the meeting, vice principal Sweeney met with respondent. During this meeting, Mr. Sweeney testified respondent neither admitted nor denied the allegations against him and he, Sweeney, never asked respondent if he engaged in the alleged conduct. Mr. Sweeney did testify that he advised respondent that Delaney was doing everything in his power to help him in this matter in order to avoid the matter resulting in his termination of employment. Respondent was concerned with what was going to occur to him and Sweeney advised that he and Delaney were doing everything in order to keep the matter in the school building without the allegations becoming public knowledge. Respondent had agreed to attend a meeting with D.W.

At the December 10 meeting, D.W. read aloud from two statements she prepared. The statement regarding respondent's alleged conduct was addressed to respondent and is reproduced here in full, with spelling and grammar corrected:

> I think you are such an asshole. Do you know what you did? Do you.
> In case you forgot, let me refresh your mind.

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I'm a 15 year old sophomore, and you are an old man, married twice, and a few kids. What if I told your kids what you did. Do you sexually abuse your children? You probably do. When my father and mom find out, you're in big trouble. You tricked me. No wonder why you brought me so many sodas. You're just one of those guys asking a little kid if she wants a lollipop to lead her into the worst moments of their life which will scar them forever. I didn't see it coming. If only you knew what you really did. You should be so ashamed of yourself, very ashamed.

You got some nerve. Do you do this (sexual abuse) to your children?

You probably do.

If there was no law I would take all your blood and eat your heart for dinner. That is what you deserve you sick, perverted old man.

Jerk off (do you do that too?)

Someone with twice as many brains as you. Faggot.

(P-3)

The statement regarding D.W.'s recollection of an earlier event which was to have been triggered by respondent's alleged conduct is reproduced here in full, with spelling and grammar corrected:

Someone cries for help, by: D.W.

Flashback to 1978

It was early evening and her brother and his friend were home and his mother was in the kitchen. A few minutes went by and her brother [went] out of the room. Her brother's friend called her in. She went in. He looked and her and pulled her towards him and asked if she could keep a secret. She had no [?] and said yes. He closed the door. From that day til today she runs from him though she never told anyone.

(Same person)

Today 1986

A few weeks ago, a man, [respondent] asked her if she had a physical form for winter track. She didn't have one so she said no. She followed him into an office, and got one. She filled it out. As she got up to leave, he grabbed her arm and told her to give him a hug. She just sat there and he gave her a hug. As he stepped back, he grabbed her again and pulled her towards him and before she knew what was happening he had kissed her. Not a regular kiss. At the first sign of this action, she jumped back and she was so scared.

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> What happened. She hated him for trying this. I still do. I hate him. He is a sick perverted old man. So I ran out of there, and in the hallway, next to my friends file. She just broke out crying. I'll never be able to forget (?) them. And I can't really tell anyone. And I hated it when people who knew about it talked to me about it. I don't know what to do. I'm still upset. I want to forget it all. But I can't.
>
> (P-2)

Delaney testified that as D.W. was reading these statements, he became emotionally upset. Delaney recalls that respondent turned to D.W. and said essentially that if he did anything to hurt her, he apologized. More of an exact quote, Delaney testified that respondent said "D., maybe not now, but sometime in the future, I hope you can find it in yourself to forgive me." It is noted that in a report (R-1) Delaney prepared of the meeting, no mention is made of these precise words although the report does state respondent "* * * was visibly shaken and apologized profusely."

After this meeting, Delaney met with respondent in the company of vice principal Sweeney. Dr. Delaney explained he advised respondent that so long as he, respondent, immediately resigned as winter track coach that he would prepare a written reprimand regarding his conduct. Delaney also advised that he would recommend to the superintendent that that be the extent of the discipline. Respondent immediately resigned as winter track coach. And advised the superintendent of the events surrounding the entire matter. (R-1). Nevertheless, the superintendent was not willing to let the matter rest at a mere written reprimand without a further investigation by the principal, and contact being made with the New Jersey Division of Youth and Family Services regarding possible criminal sexual abuse by respondent. Respondent was then suspended from his teaching duties December 11, 1986. While the Division of Youth and Family Services investigated respondent's alleged conduct with D.W., no further action was taken by that agency against respondent.

In the meantime, Dr. Delaney talked with other members of the track team who were coached by respondent. Three captains of the track team, J.I., R.D. and P.W., had no complaints against respondent.

Dr. Delaney testified that his subsequent investigation revealed that the pupils refered in the charges, in addition to D.W., complained to him regarding respondent's

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conduct. Other pupils advised that they had no problem with respondent's conduct, that they like him and that in their view respondent would not do anything wrong.

Proofs on the individual charges shall now be considered. The proofs on Charges 2 and 3 shall be considered together as shall the proofs on Charges 4 and 6.

CHARGE 1

C.A.M., whose complaint to her mother regarding respondent began the investigation into respondent's conduct, testified that during the 1986-87 academic year she was in the tenth grade. In her ninth grade, C.A.M. testified that respondent was her physical education teacher and her coach on winter track. She had no problem with respondent during her freshman year.

C.A.M. testified that when she went to respondent right before the 1986 Thanksgiving recess to get an athletic permission card, "it happened". The "it" referred to by C.A.M. was respondent's alleged conduct of touching her on her buttocks, although at hearing she demonstrated more of a grabbing action, and simultaneously told her she had nice eyes and that she looks good in pants. C.A.M. testified she saw D.W. later that day in eighth period science.

C.A.M. testified she did not observe respondent at any time pat anyone else on their buttocks at any time or any place. The incident with respondent regarding touching her buttocks occurred in the hallway by the auditorium right around the corner from the gymnasium and right before a regularly scheduled class period. C.A.M. testified she was on her way to the girls' room when she saw respondent in the hallway. This incident was to have occurred right before the eighth period class of science.

C.A.M. testified that when she returned to the eighth period science, D.W. came to class crying hysterical. C.A.M. testified that D.W. then told the eighth grade science teacher what had just occurred to her, which shall be discussed post, and D.W. then told her, C.A.M., that respondent kissed her. She, C.A.M., in turn told D.W. what respondent was to have done to her, that is patting her on her buttocks. C.A.M. denies telling any teacher that she did not believe allegations made against respondent by other female

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pupils or that what respondent was to have done to her, C.A.M., was not that bad, and she denies saying that what is happening to respondent regarding these charges is unfair.

Josephine Marchesi, a teacher of special education at Madison Central High School, testified that during 1986-87 C.A.M. told her she did not believe respondent should lose his teaching job because what he had done was not that bad. Furthermore, Ms. Marchesi testified that C.A.M. said to her she did not know how much of what the other girls were saying about him she, C.A.M., should believe.

Respondent testifies that he recalls giving an athletic permission card to C.A.M. on a Friday, November 21, 1986, in a school corridor near the boys' gymnasium some time during the morning. Respondent specifically recalls the date because several days thereafter, he says, Dr. Delaney told him of the charge that he was to have patted C.A.M. on her buttocks. Respondent explained that when C.A.M. asked for the atheltic permission card, he merely said to her "you have pretty blue eyes and you have wild looking pants." These comments, respondent testified, are similar comments he utters to other female pupils on dress up days in order to serve as positive encouragement. No other pupil ever complained to him about his comments and, respondent testified, he had no intentions of attempting to take advantage of C.A.M. Respondent specifically denies saying "you look nice in pants" at the time C.A.M. came for the athletic permission card in the corridor, respondent testified he happened to have such cards in his hand. He gave her one of the cards, and he absolutely denies patting her buttocks much less grabbing her.

This concludes a recitation of the proofs on Charge 1.

CHARGES 2 and 3

D.W. testified that during her freshman year and into her sophomore year until the complained of conduct occurred, she felt very comfortable with respondent. D.W. explained that she felt she could talk with respondent regarding school and school problems and that he would help her. In fact, D.W. testified she felt so comfortable with respondent that she would punch him on the arm as an act of greeting, and she would allow him to put his arm around her shoulders in the hallway while walking side by side as a manifestation of friendship.

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During the 1986-87 academic year, D.W. was in the tenth grade. Although respondent was not then her classroom teacher she would see him in the hall from time to time and she would go to his office in order to help him with "paperwork" during her study period. According to D.W. he would write her a pass in order to be excused from her regular study period.

Sometime during November 1986, D.W. determined she wanted to go out for winter track. In order to participate in extracurricular sports, the Board's policy requires pupils to complete an athletic permission card (J-1) which essentially obligates the pupil to give certain personal information, the pupil's parent to give a certain medical history, and a physician to certify the pupil's physical fitness for participation in athletics. D.W. testified she needed such a card in order to go out for winter track. Simultaneously, D.W. was also interested in basketball and she could not recall at hearing whether she had already taken a physical for basketball before deciding she wished to try out for winter track. Nevertheless, having determined she wished to try out for winter track, D.W. went to respondent's office in the gymnasium during the eighth period of the day on or about November 24, 1986 and asked him for a blue physical form for track. D.W. testified that she filled out the form and as she handed the form back to respondent, he grabbed her, he hugged her, and he kissed her. D.W. testified that she reacted by gathering her "gym stuff", running out of respondent's office, going to her locker which she shared with J.T. with whom she was at the time best friends, and while J.T. was present at the locker, D.W. testified she was too upset to tell J.T. what had just occurred. D.W. testified that later she did write J.T. a note and explained to her what had happened. In D.W.'s words, she was "too scared" to talk about the matter.

It is noted that at the time of hearing D.W. testified she could not recall the exact date respondent was to have grabbed her, hugged her, and kissed her. Nevertheless, she did testify that the conduct occurred sometime around the 1986 Thanksgiving holiday. It is also noted that contrary to the specification in Charge 2, D.W. testified on direct and on cross examination that respondent never patted her on the buttocks which is contrary to Dr. Delaney's recollection of what she had told him. D.W. admits that when Dr. Delaney first talked with her about the incident, she had then said that respondent had only tried to kiss her, not in fact kissed her, because she was scared and embarrassed. She did not want people to know a teacher kissed her. Nevertheless, she insists at hearing that respondent did in fact kiss her. D.W. denies ever having kissed respondent on his cheek at any time or any place.

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J.T., D.W.'s best friend with whom she shared a locker during the fall semester of the 1986-87 academic year, testified that she recalls D.W. complaining to her about respondent's conduct after the eighth period on the day it happened. J.T. testified she received no note at that time; rather, D.W. verbally explained to her that respondent allegedly kissed her. J.T. admits receiving a subsequent note in which D.W. repeated what she had verbally told J.T. regarding respondent's alleged conduct.

Regarding J.T.'s allegations contained within Charge 3, J.T. testified that at the beginning of her sophomore year in the 1986-87 year respondent, whom she would see in the hallway during the change of classes, would pat her on her buttocks an average about six times every two weeks. While J.T. testified she did not think at the time such conduct was appropriate, she did not say anything to respondent. Furthermore, J.T. testified under oath that from time to time when she would see respondent in the hallway he would put his arm around her shoulders as they were walking side by side.

J.T. testified that prior to 1986-87 she was fond of respondent and, at the conclusion of her freshman year in June 1986, she sent respondent a card (P-5) in which she praises him as a great coach and teacher and expresses her affection towards him.

Respondent testified he first met D.W. in her freshman year during 1985-86 when she was in his physical education class and on the winter track team that he coached. He described his relationship with D.W. as healthy and friendly and on a teacher-coach-student basis. In fact, D.W. sent respondent a card (P-4) during June 1986 in which she writes to him (spelling and grammar corrected):

> To me you are more than a great coach and a perfect teacher. You are my best friend. Thank you for being there when I needed you. If you every need anything, let me know. When I hit you all I'm trying to show is how much I like you. (I must like you a lot)
>
> Thanks for being there.
>
> I love you,
>
> Love,
>
> D.W.
>
> P.S. See you soon.

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Winter track, respondent testified, began after Thanksgiving in 1986, while basketball began before Thanksgiving. Respondent acknowledged that D.W. felt very comfortable with him and that she, in fact, would lean on him, put her arm around him, and hit him as her ways of showing him affection. Respondent denies ever having patted her or ever putting his arm around her. In respondent's words, D.W. is a "physical" type of person regarding her affection towards individuals she likes. He testified that D.W. lacked confidence and, consequently, as a teacher he saw nothing wrong with D.W. stopping in his office to see him, hitting him, kissing him on his cheek, or putting her arms around him. Nevertheless, respondent admits his own wife warned him about touching female pupils.

Respondent testified D.W. never came to his office to do any clerical work for him and that he never bought her sodas without being reimbursed by her for the cost of the soda. Respondent testified that during the fall semester of 1986-87, a photocopy of his grade book (R-7) shows that he had a class during the third period of the day and, as such, he had to be outside the school building; not inside where if D.W. is accurate he would have to be if she came to him during her study period. Respondent produced a list (R-2) of physical examinations administered to pupils to participate on athletic teams which shows D.W. was given a physical for basketball on November 17, 1986.

Respondent testified that an incident did occur with D.W. on November 20, 1986, a date he has firmly fixed in his mind only because of discovery preceding the de novo hearing in this case. Respondent explains that on November 20, 1986, the Thursday before Thanksgiving, at the end of period five, he was near the athletic director's office located near the girls' gymnasium. In the meantime, D.W. had asked respondent to get her a soda which he agreed to do and advised D.W. that he would be in the athletic director's office where she could pick up the soda. Respondent testified that he was in the doorway of his office when D.W. came for her soda. Respondent handed her the soda, but D.W. came towards him. Respondent testified that D.W. kissed him on his mouth. Respondent testified that he backed up and exclaimed "Whoa, D.W. What's going on here." Respondent then testified under oath that D.W. simply turned around, said nothing and left.

Despite respondent testifying that he considered her action beyond the scope of a normal student teacher relation, he did not do anything about D.W. kissing him because, in his words, D.W. was "confused". Respondent testified he decided he was going to

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straighten her out regarding the normal student teacher relation. Accordingly, the following day, respondent wanted to talk with D.W. regarding her conduct he claims occurred the previous day. Nevertheless, D.W. refused to talk with him and, in respondent's mind, her refusal was because she was too embarrassed by her conduct.

The following day, which according to respondent's fixing the date of the incident on November 20, 1986 would be November 22, 1986, respondent testified Dr. Delaney advised him that D.W. and C.A.M. were accusing him of patting them on their buttocks. Respondent testified he denied such improper conduct to Dr. Delaney but admits he did not mention D.W. kissing him two days earlier because, in her words, he did not want to embarrass her. Respondent testified that Dr. Delaney told him that there was no real need for him, respondent, to have representatives at meetings regarding the matter because the matter could be handled between him, Delaney, and respondent. Respondent testified he believed Dr. Delaney because after 19 years of teaching he felt that the situation was "no big deal" and that it could be worked out.

According to respondent the following day, which would have been November 23, Dr. Delaney was to have told respondent he now believes the allegations made against him by the girls but did not say why. Nevertheless, respondent testified Delaney advised that he would get back to him again and according to respondent repeats again that he, respondent, does not need a representative at the meetings. Respondent testified that after the Thanksgiving vacation, he was called to a meeting on December 5, 1986 in Dr. Delaney's office and told that D.W. was going to talk with Ms. Huslage but was not told why. Thereafter, on December 8, Dr. Delaney was to have told respondent that D.W. was upset and that a meeting involving the principals was to be arranged. In the meantime, respondent testified that vice principal Sweeney told him not to get D.W. upset in the meeting and not to argue with her. Respondent insisits that at the confrontation meeting which was held December 10, 1986 he still did not know that D.W. was accusing him of having kissed her. Respondent admits having received the two statements (P-2) (P-3) at the meeting and that he was shocked and hurt. He testified he wondered what was going on and he was amazed at the allegations he was reading. Nevertheless, respondent testified that remembering what vice principal Sweeney had told him he tried to make D.W. feel better so he said "Whatever happened that you are upset, I'm sorry." Respondent specifically denies apologizing for anything that he did. Respondent admits he may have said something to the effect of "forgive me in the future" because, respondent explains, he was upset and he was trying to make D.W. feel good. Respondent

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testified that he did not understand he was being accused of having kissed D.W. until he received the actual charges during June 1987. Respondent testified he did not say anything at this December 10 meeting regarding his assertion that D.W. kissed him because remembering what vice principal Sweeney had told him he, respondent, did not want to upset D.W. In respondent's view, vice principal Sweeney and Dr. Delaney mislead him. Nevertheless, he admits he resigned as track coach at the request of Dr. Delaney.

Regarding J.T., respondent denies ever putting his arm around her in the hallway during the 1985-86 year and he also denies ever having patted her on her buttocks. He denies ever putting his arm around J.T. during 1986-87 year and he denies ever having patted J.T. on her buttocks.

CHARGES 4 and 6

L.C. testified that during the 1986-87 academic year respondent was her coach on winter track. L.C. was certain in her recollection that the winter track season began after Thanksgiving. Prior to the commencement of winter track, L.C. testified she had no problem with respondent. After track began, L.C. testified that respondent began putting his arm around her but only as "encouragement" before and after track meets or at practice. On one occasion, L.C. recalls observing another female pupil running track when respondent, who was standing next to her, made a comment regarding that female pupil's chest. M.M., according to L.C., was present and heard the comment made by respondent.

M.M. testified that she never heard respondent make any comment about any female pupil's chest.

Respondent testified that until these charges were brought against him, he had no knowledge of the identity of L.C. even though she was on his track team. Respondent explains in this regard that he has students take attendance at practice. Respondent admits that while it is possible he may have put an arm around L.C.'s shoulder for coaching encouragement, not for sexual gratification, he never made an untoward comment about the size of a female pupil's chest. Nevertheless, respondent explains that as a coach he knows that the size of a pupil's hips and chest is relevant to that pupil's

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ability to run track well. Respondent theorizes that L.C. may have heard him make such an observation.

This concludes a recitation of the proofs on Charges 4 and 6.

CHARGE 5

M.M. testified that when she was in the tenth grade during 1986-87 she was a member of the winter track team. Respondent was her coach. She testified that respondent did touch her on her buttocks and put his arm around her. While she cannot recollect the first time respondent engaged in such touchings, she testified that respondent would touch her on the buttocks or put his arm around her at practice, or at a track meet, but never in the hallway. M.M. testified that she was annoyed by such touching, although she recognized that respondent engaged in such practice generally before or after a practice run for encouragement or he would touch her on her buttocks as she was merely walking by and he would say "hey, how you doing?".

M.M. did admit, nevertheless, that respondent was her friend and that she would lean on him when she became tired from running track. Nevertheless, she was annoyed by his touching her which she found offensive. Respondent generally admits for coaching encouragement he would tap various pupils on the buttocks with a clipboard he always had in his hand at track practice. In his view, physical contact with pupils is a necessary element of encouragement. Nevertheless, while he has no specific recollection of tapping M.M. on her buttocks with a clipboard, he may have done so solely as a means of encouragement at track practice or at a track meet. Respondent testified if he did tap M.M. on the buttocks with the a clipboard for encouragement, he does not recall her ever complaining about such conduct. Finally, respondent testified it is very possible he put his arm around her shoulder as a means of encouragement because he and many other coaches at the high school engage in that practice. Respondent produced a "snoopy" card (R-3) sent him by 10 female pupils including M.M. in which she writes "Mr. Wagner, it's been fun. Thanx short man. Love, M."

In this latter regard, it is noted that a series of pictures (R-10, 1-15) shows another teacher, Mr. Miller, with his arm around females who appear to be pupils on a track team and another teacher, Mr. Reynold, with his arm around another female pupil.

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This concludes a recitation of the proofs regarding Charge 5.

Respondent called in his defense several teaching colleagues, parents of pupils, and former pupils. Their collective testimony essentially is that respondent would not engage in untoward conduct with a female pupil; that it is not unusual for a high school coach to put an arm around a student athlete for purposes of encouragement; that female pupils generally liked respondent because they felt he was "cute"; and, that respondent was never observed patting anyone on the buttocks or hugging female pupils. Specifically, Donna Dingle, who is presently a teacher at a private school, but was an assistant track coach with respondent between 1982-1984, testified she never saw respondent do anything improper. No girl on the track team ever complained to her while she was an assistant coach regarding respondent's conduct. Ms. Dingle did testify she saw girls go to respondent and hug him and respondent would put an arm around their shoulders in a "good job" gesture. Ms. Dingle testified that she observed girls hug respondent after a race because they found him cute. In Ms. Dingle's view, respondent is very friendly with female pupils and female pupils liked him because he never overworked them in winter track. Finally, Ms. Dingle testified she never heard any complaints from male pupils regarding respondent.

Nicholas D. Renzi, who is a teacher at the Madison Central high school with respondent is presently on a leave of absence, testified he knows D.W. because she was pointed out to him by other students. Mr. Renzi testified her locker is to the immediate right of his classroom. Mr. Renzi also knows respondent's wife as a colleague because she teaches mathematics at Madison Central High School. Renzi testified that he would occasionally see respondent in the mathematics corridor while he was waiting for his wife to finish class. He never observed respondent touch any pupil on the buttocks. Rather, Mr. Renzi testified he did see the inside of D.W.'s locker when it was opened. Pasted on the inside door of her locker, according to Mr. Renzi, were cut outs of men not fully clothed except for "bikini-type bathing suits".

Donna Sermitsky, a physical education teacher at Madison Central high school who taught along with respondent, testified she never heard complaints regarding respondent's conduct. Ms. Sermitsky testified that she coaches the swimming team and as the coach has on occasion touched and patted student athletes on their arm or on their hand to encourage them. Ms. Sermitsky testified she never patted any pupil on their buttocks. She has placed her arm around a pupil's shoulder in a counseling and

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encouraging manner. Ms. Sermitsky had D.W. in class and testified that she, D.W. was frequently late, flighty, irresponsible, not very serious, laughing, kidding around alot, and with a tendancy of cutting class.

Larry Reynolds, a physical education teacher at Madison Central high school for the past five years, testified that his desk is in the same office with respondent's. Mr. Reynolds replaced respondent as coach of the winter track team upon respondent's suspension from duty. Mr. Reynolds testified that from his observation it was fairly common for D.W. to embrace and kiss respondent on his cheek while they were in the physical education office together, or in the hallway, or between the athletic director's office and the physical education office. Mr. Reynolds thought nothing about such conduct because as he pronounced "one has to be a coach to know that kids — unlike students — develop relationships with their coach." Finally, Mr. Reynolds testified he observed D.W. in the physical education office doing clerical work for respondent, which respondent himself adamantly denies ever having occurred. Mr. Reynolds testified that D.W. was always "hanging" around the physical education office. He testified that during the past school year while respondent was suspended D.W. said that she recognizes some individuals wanted respondent back on the job but that she would see to it that he does not come back. Mr. Reynolds admits he puts his arm around female pupils and has hugged them in a counseling, congratulatory, or encouraging manner. No one has accused him, however, of improper conduct.

John Czubati, a science teacher at Madison Central high school and a winter track coach and a golf coach, testified that he never saw respondent engage in improper conduct with any pupil and he never saw respondent pat any female pupil on her buttocks. Mr. Czubati did testify that whenever respondent was around female pupils tended to get excited an that pupils, generally, liked respondent. Mr. Czubati claims that there is a special relationship between coaches and student athletes and that it is not unusual for a coach to put an arm around a female pupil for encouragement.

Gloria Knudson has been employed by the Board as a physical education teacher assigned to the Madison Central high school for the past 22 years. In her employment she has coached track and field, cheerleaders, and basketball. She knows respondent since his initial employment and she has never heard any complaints regarding his conduct. While Ms. Knudson is not presently coaching, her recollection when she was coaching she observed respondent have good rapport with pupils. She cannot recall ever seeing

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respondent pay any female on her buttocks although she does recall seeing him put his arm around a female's shoulders if they were upset or for encouragement. In fact, Ms. Knudson testified that she sees other teachers do that as well. Ms. Knudson admitted, nevertheless, that when a pupil put their hands on her shoulder she immediately tells them to sit down.

Ellen Tehve, a mathematics teacher at Madison Central high school for the past 20 years, is assigned a classroom "a little down" the hall from respondent's wife's classroom. Ms. Tehve observed respondent in the mathematics corridor from time to time but never observed him pat anyone on their buttocks.

Lorraine Wasilewski, the mother of a daughter who is a senior at Madison Central high school, knows respondent because her son had had respondent for physical education. Her daughter was on the winter track team with respondent as the coach. Ms. Wasilewski attended 90 percent of the winter track team meets and never saw respondent pat any girl on her buttocks. She did observe respondent always have a clipboard in his hand. Ms. Wasilewski saw respondent with his arm around the shoulders of a female pupil as they walked along side to side. She did not perceive such contact to be improper because all other coaches she observed did the same thing. Ms. Wasilewski admires respondent for the care she perceives him to exhibit regarding pupils and their families. In fact, respondent assisted Ms. Wasilewski in a personal family crisis and Ms. Wasilewski sent him a written thank you note. (R-8).

R.S., a senior at Madison Central high school who participated on the winter track team in her freshman and sophomore years, testified respondent was her coach. R.S. testified she got along with respondent and she liked him. She never saw respondent pat any female on the buttocks at any time. Nevertheless, R.S. did observe respondent put his arm around female pupils for encouragement and, in fact, he put his arm around her to encourage her. Such conduct did not bother R.S. nor did she believe it to be with sexual intent. In fact, R.S. testified she expected coaches to put an arm around her for encouragement because they all did do so.

Joan O'Keefe, a guidance clerk at Madison Central high school since July 1976, testified that she would watch respondent run the track team in the gymnasium during inclement weather as she was waiting for a ride home. Ms. O'Keefe, called by respondent,

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as his witness, testified she did observe him tap females on the buttocks with a clipboard in an encouraging way, not in a derrogatory nor sexual manner.

Pamela Roe Helman, respondent's former wife, testified that she had been married to respondent for seven years. Following their divorce in March 1976, respondent has unlimited visitation rights with their daughter. According to Ms. Helman, respondent is an excellent father and she has no reservations about their daughter staying overnight with respondent. Respondent's son, Christopher, testified that he and his father have an excellent relationship and that they are not afraid to show each other their affection by hugging and kissing each other on the cheek.

Linda Burriesci was graduated from Madison Central high school in 1984. While a student, Ms. Burriesci was on the cross country team and on the winter track team for her four years of high school. While she does not recall if respondent ever tapped her buttocks with his hands, he more likely than not did tap her buttocks with a clipboard. He also put is arm around her before and after various meets and she found no problem with such conduct at all because all coaches tap students on the buttocks with clipboards and all coaches put their arms around team members for encouragement.

Sandra Laub, Lynda French, Jill Iannuzzi, and M.A., are all former students of respondent who testified on his behalf. Collectively, their testimony is they did not ever see respondent tap, hit, or slap a female pupil on her buttocks; that respondent was observed tapping a female pupil on her buttocks in a "sportsmanship" way, not a perverted sexual way; that respondent did put his arm around female pupils in a form of encouragement; and, that no one of these pupils ever saw respondent engage in conduct they deemed unprofessional or improper. One pupil, Lynda French who was graduated in 1987, testified that she did personally observe respondent pat other females with his hand on their buttocks during practice in order to get them going. She did not feel such conduct was inappropriate and no one complained to her. Sara E. Davis, the mother of Robin Davis, a former pupil with respondent, testified that because her daughter ran track while in high school she went to as many track meets as possible and to some practices. She regularly observed respondent and never saw him hit any pupil with his bare hand on thier buttocks. She did observe respondent place his hand around a female student's shoulder before after a meet. Nevertheless, she did not feel such conduct was inappropriate. Ms. Davis's daughter, Robin, testified that she never observed respondent do anything inappropriate with any female including herself.

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FINDINGS OF FACT

A resolution to the issue presented here whether respondent engaged in the conduct alleged turns on the credibility of the witnesses who testified. Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances. Spagnuolo v. Bonnet, 16 N.J. 546 (1954). For testimony to be credible it must be worthy of belief. State v. Kenilworth, 69 N.J.L. 114 (Sup. Ct. 1903), aff'd 69 N.J.L. 674 (E. & A. 1903). Credible testimony must be plausible and natural, Indiana Metal Products v. NLRB, 442 F. 2d 46 (7th Cir. 1971), and it should not be extraordinarily surprising, suspicious or incomplete. Ferdinand v. Agricultural Ins. Co. of Watertown, N.Y., 22 N.J. 482, 498 (1956). Testimony offered which appears fabricated may allow the trier of fact to assume the truth of what the witness denies. In re Bebar, 315 F. Supp. 841 (S.D.N.Y. 1970), citing Dyers v. MacDougall, 201 F. 2d 265 (2d Cir. 1952). Having had the opportunity to observe all witnesses who testified and having had the opportunity of assessing their credibility, I proceed now to find as fact based on a preponderance of all credible evidence the following:

1. Respondent has been employed by the Board as a teacher of health and physical education for 16 years. During that period of time, respondent served in various extracurricular activities and he was head coach of the coed winter track. Throughout his entire employment respondent's performance has been more than satisfactory and he was well liked by his pupils.

2. At least respondent, Larry Reynolds, and a Mr. Miller regularly put their arms around female pupils and are not at all reluctant to tap female pupils on their buttocks with a clipboard for "encouragement" to successfully complete a particular task. The Board and school administrators impliedly accept such conduct because of the absence of evidence that corrective action had been taken prior to the specific complaints registered herein against respondent. Nevertheless, even with this complaint registered by C.A.M. and D.W., there is no evidence of any action taken by school administrators or by the Board with respect to the "touching" of female pupils by male coaches particularly regarding the placing of arms around shoulders or patting one on the buttocks with a clipboard for encouragement.

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3. While the testimony of D.W. and C.A.M. suffers from inconsistencies, so too does the testimony of respondent himself. C.A.M.'s testimony under oath that she had not said what respondent had done was not that bad and she did not know how much of what others were saying she should believe is overcome by the testimony of Josephine Markesi. The testimony of D.W. is weakened in light of the fact she testified under oath she was too upset on November 24, 1986 to verbally explain to her friend, J.T., what had just happened while J.T. testified D.W. did verbally explain to her what had occurred. Furthermore, D.W.'s testimony is weakened by her admitted past conduct with respondent regarding her "punching" on the arm; developing what she perceived to be a strong "friendship" with him; and, by regularly visiting him in his office. Respondent, on the other hand, is less than completely credible when he testifies that D.W. did not do clerical work for him; that he did not know during December 1986 what the charges were against him; that Dr. Delaney, the school principal, advised him not to have a representative at the December 1986 meetings; and, that Vice Principal Joseph Sweeney lulled him into a false sence of security. Respondent's testimony is simply not believed in those matters. Nevertheless, the Board of Education carries the burden of persuasion by a preponderance of credible evidence to prove the truth of the charges it brought against respondent. Applying that standard to this matter, findings on the specific charges shall now be entered.

4. I **FIND** the evidence shows that respondent did in fact pat C.A.M. on her buttocks with a clipboard he had in his hand and said essentially that she looked "nice in pants" as charged. I further **FIND** that more likely than not such conduct occurred in a school corridor during the regular school day and that such conduct was spontaneous but without sexual intent.

5. I cannot **FIND** based on the testimony of D.W., in light of her prior conduct with respondent, that he kissed her on her mouth in his office. While comparing D.W.'s explanation with the explanation of respondent, I **FIND** that an incident did occur. Nevertheless, I cannot reach a finding on the evidence in this record that respondent intentionally or otherwise affirmatively hugged and kissed D.W. on the mouth in his office on or about November 24, 1986.

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6. I **FIND** that the evidence in this case establishes respondent did pat J.T. on her buttocks in the corridor generally during the change of classes. I further **FIND** that the evidence shows that respondent did in fact put his arm around J.T.'s shoulders and pulled her close to him in a hugging fashion. Note that this conduct did not occur in the context of a pupil-coach relationship; rather, such conduct did occur in the school house.

7. I **FIND** that the evidence establishes respondent did, in fact, place his arm around L.C. as "encouragement" on the athletic field. I do not find that respondent made an improper verbal remark which was overheard by L.C. regarding the "size of a girl's chest" because L.C. never did in fact testify as to the substance of the comment.

8. I **FIND** the evidence establishes respondent did in fact touch and pat M.M. on the buttocks and placed his arms around her shoulders during winter track practice or during winter track meets. I further **FIND** M.M. considered respondent her friend and that she would lean on him when she became tired from running track.

9. I **FIND** the evidence in this case overwhelmingly establishes that respondent perceives himself as a coach to have a license to make physical contact with the female participants in winter track. This perception of his having a license to engage in such physical contact carried over into the regular school day.

This concludes a recitation of the facts found in the evidence of this case, in addition to the background facts not otherwise in dispute between the parties.

CONCLUSION

In this case, respondent has been charged with conduct unbecoming a teaching staff member in the public schools and, under N.J.S.A. 18A:6-10, such conduct proven to be true in fact could warrant his dismissal from his tenured employment. The facts in this case clearly disclose respondent's perception of his having a license as a coach to pat female pupils on their buttocks with a clipboard or to place his arm around them in a hugging fashion. Such conduct is conduct not otherwise tolerated by the Commissioner.

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See, In re Richard Wolfe, National Park School District, 1987 S.L.D. _____ (July 1, 1987). Teachers who happen to be coaches are not above the standard of conduct expected of other teachers. Accordingly, respondent's conduct proven true in here is, I **CONCLUDE**, conduct unbecoming a teacher.

Conduct which is proven to be unbecoming conduct does not require automatic dismissal on one's tenured employment. Rather, the nature and circumstances of such conduct must be viewed in their entirety. In re Jacques L. Samons, 1972 S.L.D. 302. Respondent's long record of employment with this Board, otherwise unblemished but for the incidents herein, together with his apparent devotion to the development of the minds of the pupils who have studied with him, certainly demands mitigation of the ultimate sanction of dismissal. Furthermore, the conduct complained of here, the physical contact regardless of how incident appearing between teacher and female pupil, is conduct which by all accounts has been tolerated in the school system. Therefore, dismissal from respondent's tenured employment is singularly inappropriate.

Accordingly, given all the circumstances in this matter, a fair and reasonable discipline to impose upon respondent is a reduction in salary in an amount equal to 120 days of salary together with the loss of salary increments respondent would have earned during 1986-87 and 1987-88 had the present charges not been brought against him. Such salary reduction shall go into effect for the 1988-89 academic year when the respondent is reinstated to his position as a teacher in the Board's employ as of September 1, 1988.

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This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

May 16, 1988
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

MAY 16 1988
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

MAY 19 1988
DATE

OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE TENURE	:	
HEARING OF WILLIAM T. WAGNER,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF OLD BRIDGE, MIDDLESEX COUNTY.	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law.

The Commissioner has deemed the exceptions to the initial decision by the Board to have been filed in accordance with the provisions of N.J.A.C. 1:1-18.4.

In its exceptions the Board concurs with the ALJ's findings which hold that respondent is guilty of conduct unbecoming a tenured teacher with respect to the tenure charges which were certified against him. The Board, however, rejects the conclusion reached by the ALJ that the recommended penalty to be imposed against respondent should be less than his dismissal.

Initially, the Board excepts, at page 3, to that finding of the ALJ which appears in the initial decision, ante, and reads as follows:

> At least respondent, Larry Reynolds, and a Mr. Miller regularly put their arms around female pupils and are not at all reluctant to tap female pupils on their buttocks with a clipboard for "encouragement" to successfully complete a particular task. The Board and school administrators impliedly accept such conduct because of the absence of evidence that corrective action had been taken prior to the specific complaints registered herein against respondent. Nevertheless, even with this complaint registered by C.A.M. and D.W., there is no evidence of any action taken by school administrators or by the Board with respect to the "touching" of female pupils by male coaches particularly regarding the placing of arms around shoulders or patting one on the buttocks with a clipboard for encouragement.
>
> (Initial Decision, ante)

The Board argues that the ALJ's finding cited above has erroneously led to his conclusion stated in pertinent part in the initial decision, ante, which reads as follows:

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> Furthermore, the conduct complained of here, the physical contact regardless of how [innocent] appearing between teacher and female pupil, is conduct which by all accounts has been tolerated in the school system. Therefore, dismissal from respondent's tenured employment is singularly inappropriate. (Initial Decision, ante)

In response to the above-cited findings and conclusions by the ALJ, the Board maintains that there was no evidence offered at the hearing which would establish that the Board or any school administrator had any prior knowledge of such physical contact by teaching staff members with female pupils within the confines of the school building during school hours. More specifically, the Board points out that as soon as the allegations of physical contact by respondent were brought to the attention of the school administrators, an investigation was conducted which resulted in the Board's certification of tenure charges against respondent.

The Board maintains that the record clearly establishes that not only did respondent hug female pupils during athletic activities or events and during regular school hours, but the ALJ found that respondent also patted female pupils "on the buttocks with a clipboard and with his bare hand both during track practice and during regular school hours." (Board's Exceptions, at pp. 3-4) (See also footnote on page 4 of exceptions.) The Board claims that in view of these findings of fact contained in the record, the ALJ should not have considered any mitigation of the penalty to be imposed against respondent.

The second point of exception to the initial decision advanced by the Board pertains to the ALJ's failure to consider the "incident" with D.W. in which respondent was charged with the following:

Charge 2

> On or about November 24, 1986, [respondent] improperly made physical contact with a female student, [D.W.], by patting [D.W.] on the buttocks, and thereafter while in his office, hugging [D.W.] and kissing her on the mouth.***
> (Initial Decision, ante)

The Board maintains that although the ALJ did not find that respondent kissed D.W., nevertheless he did find that "an incident did occur." (Initial Decision, Finding of Fact No. 5, ante) It avers that inasmuch as an incident between D.W. and respondent did occur, it raises serious questions about respondent's judgment and about his fitness to teach especially in view of the ALJ's Finding of Fact No. 3 in the initial decision which states in part that D.W. had developed a strong "friendship" with respondent and had regularly visited him in his office.

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The Board also relies on respondent's own testimony reported in the initial decision in support of its argument that respondent's conduct toward D.W. demonstrated a marked lack of judgment and a lack of restraint which is expected of teachers:

> Moreover, the respondent himself testified that "D.W. lacked confidence and, as a consequence, as a teacher, he saw nothing wrong with D.W. stopping in his office to see him, punching him in the arm, kissing him on the cheek, or putting her arms around him." (p. 14) In short, the respondent did nothing to dissuade D.W. from developing this strong "friendship" with him.
>
> (Board's Exceptions, at p. 5)

Finally, the Board points out that the ALJ found that respondent's testimony lacked credibility and was simply not to be believed insofar as he stated that D.W. did not do clerical work for him; that respondent did not know during December 1986 what charges were against him; that Dr. Delaney, the school principal, advised him not to have a representative at the December 1986 meeting; and that the vice principal, Joseph Sweeney, lulled him into a false sense of security. (See Initial Decision, ante)

The Board, therefore, urges the Commissioner to reject the ALJ's recommendation of a penalty less than dismissal of respondent from his tenured teaching position by virtue of his being found guilty of unbecoming conduct, his lack of credibility and absent any actual mitigating factors other than his prior employment record with the Board.

The Commissioner has considered the testimony of the witnesses adduced at the hearing, the exhibits in evidence and the Board's exceptions to the findings, conclusion and recommendation set forth in the initial decision.

In the Commissioner's view, the Board has carried its burden of proving that respondent, a professional teacher, is guilty of unbecoming conduct by virtue of his unacceptable behavior with certain of his pupils. Therefore, the consequence of respondent's actions must be taken into consideration by the Commissioner in arriving at a final determination with respect to the imposition of a penalty to be assessed against respondent pursuant to the applicable provisions of N.J.S.A. 18A:6-10 et seq.

It is for this purpose that the Commissioner finds it necessary to comment further upon those circumstances giving rise to the incidents in connection with the Board's tenure charge of unbecoming conduct against respondent. The Commissioner observes that the six incidents upon which the Board has instituted its tenure charges against respondent involve his unacceptable behavior during the regular school day and during certain times when he was coach of the interscholastic track and field program at Madison Central High School. It is further noted that all of these incidents involve respondent's behavior with female pupils as

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indicated in the Findings of Fact set forth in the initial decision, ante.

In reviewing the Board's exceptions to the initial decision as they relate to the Findings of Fact, the Commissioner cannot agree with that portion of Finding No. 2 which essentially holds that the Board and its administrators impliedly accepted the conduct of respondent, Larry Reynolds, or a Mr. Miller who regularly put their arms around female pupils and were not at all reluctant to tap female pupils on their buttocks with a clipboard for "encouragement" to successfully complete a particular task. In the Commissioner's view, there is no evidence in the record which would establish either that any complaints had been directed to the Board or its administrators about such conduct or that the Board or the administrators were previously aware that these individuals had engaged in such conduct. As a matter of fact, there is no evidence in the record to indicate that the Board or its administrators were aware of such conduct on the part of the other individuals prior to the time this case was instituted before the Commissioner.

In the Commissioner's view, the ALJ correctly relied on Wolfe, supra, which stands for the proposition that teachers who happen to be coaches are not above the standard of conduct expected of other teachers.

Given the testimony of those persons who testified on respondent's behalf at these proceedings, the Commissioner deems it appropriate at this juncture to reiterate such admonition especially as it pertains to coaches teaching pupils of the opposite sex, as herein. The Commissioner is mindful of the fact that teachers who engage in coaching pupils in school athletic programs must strive to instill an enthusiastic competitive spirit in order to help pupils achieve their maximum athletic potential. In the process of so doing, coaches often establish a degree of rapport and closeness not as readily found in the regular classroom. Nevertheless, it must be clearly understood that teachers' methods of encouraging their pupils as well as their own conduct must be exercised with a considerable amount of restraint, sensitivity and proper professional judgment, especially in those instances described herein. Teachers or coaches who exceed the accepted bounds of propriety by failing to respect the right of pupils to be free from unnecessary or unwarranted physical contact lose the respect of those pupils and thereby diminish their own effectiveness.

Moreover, teachers or coaches, who exercise poor judgment engaging in unnecessary and inappropriate physical contact with pupils whom they are instructing or coaching, are accountable for their actions. Such behavior may lead to Board actions against them and/or condemnation by the parents of the community who entrust the education of their children to them.

In the instant matter, it is evident that respondent did engage in inappropriate behavior and used extremely poor judgment in his relationships with certain pupils both as a coach and during the regular school day.

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The Commissioner does not find, however, there is any evidence in the record which establishes that any of the incidents pertaining to respondent's unacceptable conduct could be deemed to be of such a nature as to constitute sexual child abuse. This finding also is made in connection with the incidents in which respondent was charged involving D.W. The Commissioner observes that a similar finding was made by DYFS in connection with the sexual abuse charges made by D.W. against respondent through the issuance of a report to the superintendent dated February 20, 1987.

The Commissioner finds further that the ALJ correctly determined that respondent's acts of improper physical contact with certain female pupils during the course of the regular school day, as well as the relationship which he unwittingly allowed to occur between himself and D.W., amount to nothing more than his misguided perceptions as a coach which carried over into the regular school day. In the Commissioner's judgment, respondent grossly and seriously misperceived his role as a coach and as a teacher insofar as he took license to engage in inappropriate and unwarranted physical contact with female pupils whom he coached in winter track during the course of the regular school day.

The Commissioner does not condone the actions of respondent complained of herein which he deems to be conduct unbecoming a teacher. He also finds that the injudicious behavior exhibited by respondent in this matter caused an emotional, overt, unexpected, negative response from D.W. that precipitated the Board's investigation which, thus, resulted in the certification of tenure charges against him. Innocent as he may have perceived his overly friendly relationship with D.W., his failure to discourage her overt manifestations of affection led directly to his current status.

Thus, the Commissioner concludes that respondent's failure to recognize the consequences of his unacceptable behavior toward the female pupils in question ultimately caused him to become the victim of his own actions by virtue of the fact that he was required to defend himself in the instant tenure proceedings.

The Commissioner, however, is not persuaded by the Board's exceptions to the initial decision which demand a penalty of dismissal from employment to be imposed upon respondent.

The Commissioner views respondent's unbecoming conduct in the instant matter within the context of those findings of fact set forth in the initial decision and an otherwise unblemished 16-year record of employment with the Board.

In the Commissioner's judgment, respondent has suffered mental anguish, a hearing that could have resulted in the loss of his tenured teaching position, damage to his professional reputation and he will be required to exert himself to reestablish his reputation and standing because of his failure to exercise proper judgment and restraint in respecting the integrity of his female pupils and their right to be free from unwarranted physical contact.

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Accordingly, the Commissioner adopts as his own those findings and conclusions set forth in the initial decision which find respondent guilty of conduct unbecoming a teacher but which impose a penalty of less than dismissal from his tenured position. The penalty shall be loss of 120 days' salary and salary increments during 1986-87 and 1987-88.

COMMISSIONER OF EDUCATION

June 22, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2694-88
AGENCY DKT. NO. 83-4/88

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF MULLICA TOWNSHIP, ATLANTIC COUNTY,

---

Frances Sweetwood, complainant, pro se
Louis Greco, Esq., for the Board of Education of Mullica Township (Donio, Bertman, Johnson, Sahli & Greco, attorneys)

Record Closed: May 12, 1988 Decided: May 17, 1988

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

STATEMENT OF THE CASE

Complainant, a defeated incumbant candidate for a seat on the Board of Education of the Township of Mullica (Board) at the Annual School Election held on April 5, 1988, alleges that a resident voter illegally interfered with the election process and that election should be overturned. The Board duly represented at the hearing, takes no official position with regard to the herein complaint.

PROCEDURAL ASPECTS

On April 8, 1988, complainant Frances Sweetwood filed a letter with the Commissioner of Education (Commissioner) alleging violations of the Education

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Election Laws and requesting an inquiry. On April 18, 1988, the Commissioner transmitted the matter to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. A hearing was scheduled for April 27, 1988 before the Honorable Jeff Masin, Administrative Law Judge (ALJ). The hearing was adjourned due to inadequate notice to the parties and relisted for May 12, 1988 before the undersigned. The inquiry hearing was duly conducted on May 12, 1988 at the Mullica Township Municipal Court, Elwood, New Jersey and the herein record was closed on that date.

ISSUES

In her letter complaint, complainant Sweetwood alleges violations of N.J.S.A. 18A:14-72 and N.J.S.A. 18A:14-73. Therefore, the issues to be determined by this inquiry are as follows:

1. Whether a person identified as Larry Angel did interfere with any polling booth or obstruct the entrance to any polling place or do any electioneering within the polling place? N.J.S.A. 18A:14-72.

2. Whether Larry Angel loitered, electioneered or solicited any voter within 100 feet of the polling place? N.J.S.A. 18A:14-73.

FINDINGS OF FACT

Having carefully considered the testimony and other evidence proffered at the hearing and having given fair weight thereto, and having assessed the credibility of the witnesses as they testified before me, I **FIND** the following **FACTS** in this matter.

1. The Board's annual school election was held on April 5, 1988, pursuant to N.J.S.A. 18A:14-1 et seq., between the hours of 5:00 p.m. and 9:00 p.m.

2. The Mullica Township School District is an elementary school district under the direction and control of the Board.

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3. The Mullica Township School District is a constituent school district of the Board of Education of the Greater Egg Harbor Regional High School District for the education of its secondary pupils.

4. The Board's annual school election was held on April 5, 1988 and was conducted at Polling District #3, Gertrude S. Lauer School.

5. Complainant Sweetwood ran as an incumbent member of the Board at the annual school election on April 5, 1988.

6. Complainant Sweetwood was defeated for a seat on the Board by five (5) votes.

7. Larry Angel, a Mullica Township resident, is known in the community to be loud and boisterous in his speech and demeanor.

8. On the evening of April 5, 1988, Larry Angel appeared at the school election polling place and was observed by the election workers to be loud and boisterous.

9. On different occasions, two (2) election workers asked Larry Angel to lower his voice and/or to be quiet while in line in the polling place; i.e., election judge Ida Jackson and election clerk Charlotte Mitchell.

10. None of those witnesses who testified at this inquiry observed or heard Larry Angel say anything about defeating any incumbent Board member or members, comment about school taxes or the Board's 1988-89 budget, or to request the voters to cast their ballots for a particular candidate.

11. There was no evidence produced to demonstrate that the voting machines were marked in such a way as to interfere in the election.

12. Complainant Sweetwood offered into evidence a statement by Peter R. Ponzetti (P-2) wherein Ponzetti alleged that an unnamed individual at the polling place conveyed his thoughts that those voting should reject

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the Board's budget and suggested those in line to cast their ballots with the reminder of who the incumbent Board members were.

13. Peter R. Ponzetti did not appear at this inquiry to be examined as to his observations and to identify the unnamed individual alleged to have made the statements.

14. The election workers, testified, credibly, that at no time did any voter register a complaint to them, collectively or individually, concerning Larry Angel's conduct and/or behavior.

DISCUSSION OF THE LAW AND CONCLUSIONS

The statutes which complainant Sweetwood alleged were violated at the April 5, 1988 annual school election are set forth hereinbelow:

N.J.S.A. 18A:14-72. Obstructing elections; electioneering near polling place prohibited

If a person shall on any day fixed for any election tamper, deface or interfere with any polling booth or obstruct the entrance to any polling place, or obstruct or interfere with any voter, or loiter, or do any electioneering within any polling place or within 100 feet thereof, he shall be a disorderly person and shall be punished by a fine not exceeding $500.00 or by imprisonment not exceeding one year, or both.

N.J.S.A. 18A:14-73. Marketing or showing ballot; loitering; electioneering; penalty

No person shall within the polling room mark his ballot in a place other than in the polling booth or show his ballot, nor shall anyone request such person to show his ballot during the preparation thereof, nor shall any other person inspect such ballot during the preparation thereof or after it is prepared for voting in such a way as to reveal the contents, nor shall any person within the polling place or within 100 feet thereof, loiter, electioneer, or solicit any voter or prompt a voter in answering any questions required to be answered by such voter in connection with any election.

Any person violating any provisions of this section shall be a disorderly person and shall be punished by a fine not exceeding $500.00, or imprisonment not exceeding one year, or both.

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The credible evidence adduced at the inquiry fails to demonstrate that either one or both of the statutes was violated. There was no proofs produced to persuade this tribunal that the election should be invalidated, and I so **CONCLUDE**. It is well established that elections are to be given effect whenever possible and are not to be set aside unless it can be shown that the will of the people was thwarted, was not properly expressed, or could not fully be determined. *Mundy v. Bd. of Educ. of the Boro of Metuchen*, 1938 S.L.D. 194. *In the Matter of the Annual School Election Held in the Township of Pittsgrove, Salem County*, 1976 S.L.D. 585, 589.

There has been no showing here of any violation of the Education Election Laws and, accordingly, the will of the electorate must be given full effect.

ORDER

It is therefore, **ORDERED** that the herein complaint seeking to invalidate the annual school election of the Mullica Township Board of Education held on April 5, 1988 be and is hereby **DISMISSED**.

This recommended decision may be adopted, modified or rejected by **SAUL COOPERMAN, COMMISSIONER, DEPARTMENT OF EDUCATION**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

May 17, 1988
DATE

Lillard E. Law, JR
LILLARD E. LAW, ALJ

Receipt Acknowledged:

5-20-88
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 20 1988
DATE

OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF MULLICA, ATLANTIC COUNTY.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed in the matter.

Upon consideration of the record, the Commissioner concurs with and adopts as his own the findings and conclusion of the Administrative Law Judge in this election inquiry. Having found that no violation of the law occurred in this matter, the Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

June 27, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1397-88
AGENCY DKT. NO. 355-12/87

BOARD OF EDUCATION OF THE TOWNSHIP OF SCOTCH PLAINS-FANWOOD,

Petitioner,

v.

FRANK PALADINO,

Respondent.

Casper P. Boehm, Jr., Esq., for petitioner

Frank Paladino, pro se

Record Closed: May 13, 1988 Decided: May 17, 1988

BEFORE: **WARD R. YOUNG, ALJ:**

The Board of Education of the Township of Scotch Plains-Fanwood (Board) certified charges of unbecoming conduct against Frank Paladino (Paladino), a tenured custodian. Paladino avers the Board acted unfairly and that its charges are not true.

The matter was transmitted to the Office of Administrative Law on March 7, 1988 as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on April 14, 1988 at which it was suggested to Paladino that he seek legal representation, which was rejected by him. The matter then proceeded to plenary hearing on April 22, 1988. A schedule for post-hearing submissions was determined, and the record closed on May 13, 1988 after same were filed in a timely fashion.

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CERTIFIED CHARGES

The charges of unbecoming conduct certified by the Board are as follows:

1. Utilizating a Board approved medical leave of absence for other than the stated reason.

2. Absenting himself from Coles Elementary School without punching the time clock to indicate the actual time left.

3. Falsifying a time attendance record by being absent from Coles Elementary School while the time card indicated a later ending time.

4. Allegedly tampering with time clock to indicate a later ending time.

5. Attempting to obtain district funds under false pretenses by claiming compensation for hours of employment not worked.

CHARGE NO. 1

Paladino requested a leave of absence from the Board from the conclusion of his four weeks of vacation on July 20, 1987 to October 30, 1987 in order for him "to take time off". See, P-18. His request was denied by three agents of the Board, namely, personnel specialist Raiford, Assistant Superintendent Marshall, and Superintendent Howlett. See, P-19 and P-20. The record is silent as to whether Paladino's request ever reached the Board, but this was never an issue.

A review of Paladino's attendance record reveals that he began his four weeks vacation on June 22, 1987 and did not report back to work again until September 8, 1987, with absences being recorded for illness from July 21, 1987 through August 5, 1987, two personal days on August 6 and 7, 1987, and a leave of absence recorded from August 10 to September 8, 1987. The only absence recorded from September 8, 1987 until his suspension on October 6, 1987 was a sick day on September 29, 1987. See, P-26.

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Medical notes under dates of July 18, 1987 and August 25, 1987 from an Arthur C. Tutela, M.D., indicated Paladino was unable to work because of neurosthenia. See, P-22. The July 18 note indicated that Paladino was unable to work until August 24, while the August 25 note indicated he was unable to work until September 8.

The Board legitimized Paladino's absence from August 10 to September 8 by approving his leave of absence without pay for medical reasons at its regular September 18 meeting, presumably on the doctor's note presented to Raiford by Paladino's wife on August 26.

Neurosthenia is defined in Stedman's Medical Dictionary as "A condition in which the nerves respond with abnormal force or rapidity to slight stimuli," and in the Sloan-Dorland Annotated Medical-Legal Dictionary as "a neurosis characterized by chronic weakness, easy fatigability, and sometimes exhaustion; believed by some to be one of the psychophysiologic, or psychosomatic, disorders."

The Board retained the services of ARGUS Security Systems to conduct a surveillance of the activities of Paladino on September 1, 1987, while he was on leave for medical reasons. Louise A. Osgood, an ARGUS investigator, testified that she conducted the surveillance, took pictures and filed her report. See, P-1 and P-2. Her testimony that Paladino left his home at 8:10 a.m. and engaged in masonry work at the Carlton Club Apartments until 12:15 p.m. was not disputed by Paladino.

A review of Paladino's attendance record during the summers of 1984 through 1987 reveals that he has worked an insignificant number of days in July and August, having been absent by reason of vacation, sick days, personal days, or approved leaves.

In response to query posed by the undersigned to explain his absences during those summers, excepting for vacation time, Paladino indicated a pain in his knee required him to rest. Paladino did not respond to the next query as to why his painful knee only required rest in August.

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Paladino did testify that he did take days off from his employment as a custodian when school was not open in order to promote his masonry business; his $20,000 custodial salary was insufficient to support his family of a wife and two children; and that he requested summer leave of absence in order to promote his masonry business.

I **FIND** the charge that Paladino utilized the Board's medical leave of absence for other then the stated reason to be **TRUE.**

CHARGES NOS. 2, 3, 4, and 5

These charges will be addressed collectively as they all related to a single incident on the night of October 5, 1987.

It is undisputed that Paladino worked the late shift on October 5, 1987 as custodian at the Coles elementary school; the shift is normally from 3:00 p.m. to 11:30 p.m., but on this day two additional hours of overtime had been approved, extending Paladino's shift to 1:30 a.m. on October 6.

Carl M. Kumpf, principal of the Coles school, testified that he entered the school building at 11:12 p.m. on October 5; Paladino's truck was not parked at the school; and Paladino was not present. He further testified he checked Paladino's time card and observed it was punched in at 2:59 and punched out at 1:31. See, P-3. He then stated he punched himself in at 11:13 to verify his presence and that the time clock was in working order.

A conference was held the following day after Paladino punched in at 2:57. Assistant Superintendent Marshall conducted it in the principal's office with Raiford, Kumpf, and Paladino, at which Paladino was suspended from his employment by Marshall (upon the Superintendent's authorization), who requested that Paladino turn over his keys to him. Paladino did so but requested that he retain one "personal" key. Kumpf testified that he believes the retained key was for the time clock, which provided Paladino access to it so he could punch out at 1:31 and leave sometime before 11:12, which would enable him to be compensated for time not worked.

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Paladino testified that the key was for his locker at the school, and that he was present at the Coles school from 2:58 in the afternoon of October 5 until he left at 1:31 a.m. on October 6. He further stated that his wife drove him to work and picked him up at the end of his shift to explain why Kumpf did not see his truck, and further that he must have been in the men's room when Kumpf could not find him in the building.

It is noted that the time clock punches only the time and date on the time card. There is no indication as to whether the time is a.m. or p.m. It is also noted that the 1:31 punch-out time, which Paladino stated was 1:31 a.m. on October 6, indicates the date of October 5. This observation raised the question by the undersigned as to how this could occur if both the testimony of Kumpf and Paladino were deemed to be credible. It obviously could not. The Board contends Paladino had access to the time clock, turned it back to 1:30 and punched-out, which did not trigger the change of date at midnight. Paladino proffered that Kumpf was wrong when he testified that Paladino was not in the building at 11:12, and it was not unusual for the time clock to be defective.

Conflicting testimony on these charges requires that truthfulness be determined by the credibility of the testimony of Kumpf and Paladino. Both can be said to have motives for distorting the truth. The Board's agents pursued its objective of seeking documented evidence for a charge of unbecoming conduct by the retention of ARGUS. Paladino was obviously motivated to save his job to secure his salary, and still supplement it through his masonry business. The demeanor of both witnesses under oath could easily lead one to believe they were each telling the truth, but one must be suspect.

Documentary evidence indicates that 17 mailings were made to Paladino. Most were sent by regular mail to his home address, some were sent in inter-school mail to him at the Coles school, and some were sent to his home address by certified or registered mail with return receipt requested. Paladino testified he received most of the mail, but did not receive those sent to him at the Coles school. He testified, however, that he did

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not receive P-27 (certified mail), P-28 (registered return receipt requested), or P-31 (certified and receipted by his daughter Antonetta). The credibility of Paladino is suspect when consideration is also given to his conduct underlying Charge No. 1 and the pattern of his four summers of absenteeism coupled with his testimony that his painful knee required rest, but only in August, as his attendance from September school opening to school closing in June was generally commendable. Credence is therefore granted to the testimony of Kumpf.

FINDINGS OF FACT are adopted for Charges No. 2 through No. 5 as follows:

No. 2: Paladino absented himself from his employment at the Coles school sometime prior to 11:12 p.m. on October 5 and was compensated for having worked overtime until October 6. The charge is **TRUE.**

No. 3: Paladino falsified his time attendance record for his October 5, 3:00 p.m. to October 6, 1:30 a.m. shift. The charge is **TRUE.**

No. 4: Paladino is responsible for the correctness of his time card, which was incorrect as already found in Charge No. 2. I make no finding as to whether the key he retained was for the time clock or his locker because of insufficient credible evidence to support such a finding, but I do find that Paladino somehow tampered with the time clock to produce the erroneous recordings on P-3, and therefore find the charge to be **TRUE.**

No. 5: The charge was addressed in Charge No. 2 and I find it to be **TRUE.**

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DISCUSSION AND CONCLUSIONS OF LAW

It is indeed unfortunate when an otherwise good employee establishes a pattern of conduct which allows his desire to increase his earned income through "outside" work to interfere with his responsibilities and obligations as a tenured custodian. It is obvious that Paladino's conduct during the last four summers left the burden of the preparation of the Coles school for each September opening to other regular custodians or substitutes. It is a burden that should not shift in the absence of unavoidable reasons. Paladino's pattern of absenteeism each summer in August allegedly because of a painful knee, which did not apparently need to be rested during the remaining eleven months, but did not preclude him from active engagement in his masonry business, is deemed to be unbecoming conduct.

In Redcay v. State Board of Education, 130 N.J.L. 369 (Sup. Ct. 1943); aff'd 131 N.J.L. 326 (E. & A. 1944), Justice Bodine of the New Jersey Supreme Court stated at 371.

> 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.

I **FIND** that Frank Paladino has demonstrated a lack of committment to the Scotch Plains-Fanwood Board of Education to fulfill his year-round responsibilities in his employment as custodian at the Coles elementary school. I also **FIND** the truthfulness of the charges certified by the Board to warrant the dismissal of Frank Paladino from his tenured position as custodian.

I **CONCLUDE**, therefore, that Frank Paladino shall be and is hereby **DISMISSED** from his tenured position. **IT IS SO ORDERED.**

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This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Commissioner Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

17 May 1988
DATE

WARD R. YOUNG, ALJ

5/20/88
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

MAY 20 1988
DATE

Mailed To Parties:
FOR OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE TENURE	:	
HEARING OF FRANK PALADINO, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF SCOTCH PLAINS-	:	DECISION
FANWOOD,UNION COUNTY.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed in the matter.

Upon consideration of the tenure charges in this matter, the Commissioner agrees with the Administrative Law Judge that the Board has borne its burden of proof that respondent engaged in unbecoming conduct and that such conduct warrants his dismissal as a tenured custodian in the Scotch Plains-Fanwood School District, as of the date of this decision.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

June 28, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

ORDER
GRANTING EMERGENT RELIEF
OAL DKT. NO. EDU 4099-88
AGENCY DKT. NO. 169-6/88

V.F. ON BEHALF OF A.F.,
Petitioner,
v.
BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF HADDON HEIGHTS,
Respondent.

William J. Sragow, Esq., for petitioner

Anne McDonnell, Esq., for respondent (Hannold, Caulfield, Marshall & McDonnell, attorneys)

Record Closed: June 13, 1988 Decided: June 14, 1988

BEFORE **RICHARD J. MURPHY**, ALJ:

Petitioner, a high school senior, seeks emergent relief under N.J.A.C. 1:1-12.6 ordering the respondent Board of Education to award him a passing grade in physical education for the 1987-88 school year and to allow him to graduate with his class on June 17, 1988. A hearing was held by telephone at 4:00 p.m. on Thursday, June 9, 1988, and additional certifications were submitted on June 13, 1988.

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FACTS

There is no dispute as to the facts necessary to decide this motion. The respondent, Board of Education, requires students to purchase a garnet and gold gym uniform to be worn in physical education classes (Exhibit A). Students are informed that they must participate in physical education activities and must wear the "proper and appropriate clothing" consisting of the approved uniform. The physical education grade is based on 70 percent for dressing and participation, 20 percent for a physical fitness test and 10 percent for a skill test. Students who dress and participate everyday are not to receive a grade lower than 73 (Exhibit B). The specific penalty for each day out of uniform is a nine-point reduction from the 100 points allotted each marking period.

Throughout the 1987-88 academic year, A.F. fully and satisfactorily participated in physical education class and scored well on fitness and skills tests. He failed, however, on at least 23 and possibly as many as 40 occasions to wear the Board approved garnet and gold gym uniform. He chose, apparently for some idiosyncratic reasons not revealed by the record, to wear Hawaiian shorts or other bright clothing. Because of his failure to wear the Board approved uniform he was given a failing grade for the first two marking periods. Despite his unconventional garb, he was allowed to participate in the physical education class. His gym teacher, Deborah DiPaolo, advised A.F. to wear the proper uniform, and in the third marking period he began to do so (DiPaolo affidavit at page 2). DiPaolo claims, and A.F. does not dispute, that he came without the correct uniform 20 times in the first marking period, 17 times in the second marking period and three times in the third marking period. From time to time, he came in the correct uniform, which he owned. DiPaolo stated in her affidavit that A.F.'s attire was loud, ostentatious, and attention-getting, and that A.F. responded to her warnings with indifference or disdain. A.F. was not scheduled to take physical education for the fourth marking period but was allowed to do so to bring up his grade. DiPaolo states, that A.F. showed up for his first class of the fourth marking period in the correct uniform and "that ended that." (Ibid. at p. 2.) A.F.'s final failing grade was a 60. His final grade on physical fitness was 15 out of a possible 20 and for skills a 10 out of a possible 10. But for the matter of improper uniform, he would have been awarded a passing grade.

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A.F.'s gym teacher did not discipline him through the course of the school year for his failure to wear the proper uniform. He was not subjected to after-school detention, make up classes, or penalty laps around the track and the like. Certifications submitted by other gym teachers employed by Haddon Heights High School state, in unison, that students are required to wear correct uniforms for gym and the failure to do so is considered lack of preparation for which points are deducted. None of the gym teachers submitting certifications impose discipline other than the deduction of points for lack of preparation. At the hearing, counsel for the petitioner claimed that some gym teachers at Haddon Heights had imposed alternative discipline, but there is no evidence to support this finding in the record. The parties also agree that gym students at Haddon Heights were allowed to wear sweat suits of various colors over their gym uniforms while participating in outdoor activities. There is no dispute as to the above facts, and I so **FIND.**

ISSUE

The question presented is whether the petitioner is entitled to graduate with his class with a passing grade on the grounds that the respondent Board's uniform policy is arbitrary and unreasonable in that it uses grades as a disciplinary measure and serves no valid educational purpose.

ARGUMENTS AND CONCLUSIONS

Petitioner argues that the Board's action in failing him for improper uniform and thus barring him from graduating is an impermissible use of a grade as a disciplinary sanction under the case of V.J.H. v. Board of Education of the City of Orange Township, OAL DKT. EDU 8138-86, Commissioner's decision July 23, 1987. A.F. also argues that he fully participated in the gym class and attained all the objectives of physical education set forth in the Board's policy. He further claims that the Board policy is arbitrary and serves no legitimate educational purpose and is further arbitrary in that students were allowed to wear sweat suits not covered by the uniform policy.

The Board responds that the petitioner's failing grade was in no sense a disciplinary sanction, but rather was merely a reflection of the fact that he was unprepared to participate in gym class because he was wearing an inappropriate uniform.

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The Board defends its uniform policy as reasonable and related to valid educational purposes.

Neither the State Education Law nor the regulations promulgated by the Commissioner address the issue of appropriate dress for gym class. See, N.J.S.A. 18A:35-7; N.J.A.C. 6:29-6.1 et seq. The matter of appropriate gym uniforms is thus left to the reasonable discretion of boards of education. Petitioner argues that the Board abused its discretion in this instance by giving him a failing grade and cites the V.J.H. case as authority. In V.J.H., the Commissioner rejected as arbitrary a board policy requiring that an automatic failing grade (40) be given "attendance failures" in physical education. (Opinion at p. 15.) The Commissioner noted that he has consistently refused to uphold policies calling for an automatic imposition of grade penalty for unexcused absences or absences resulting from suspensions. The prohibition contained in V.J.H. is against the use of grades as a disciplinary measure. In rejecting that practice, the Commissioner found it reasonable that penalties be imposed for unpreparedness since "being prepared is essential to the learning process and is justifiably considered in arriving at a course grade for a pupil, be it for the marking period or final grade." (Opinion at p. 14.) The Commissioner also would uphold a reduction in a class participation grade or denial of course credit for failure to meet attendance requirements. Excessive absences and truancy from class also may justifiably lead to the withholding of credit and denial of graduation.

The question here is whether the Board's policy and action was a reasonable penalty imposed on petitioner or whether it was an impermissible use of grades as a disciplinary sanction. Petitioner must also demonstrate on this application for emergency relief that he will be irreparably harmed if his requested relief is denied.

From the Board's perspective, this is a simple case of a student who refused repeatedly and without reason to comply with a reasonable dress requirement and consequently received a failing grade in gym class. The petitioner, without offering any explanation for his conduct, maintains that he successfully participated in the class and that his failing grade does not reflect this participation and is therefore an inappropriate and unlawful use of a grade as a disciplinary measure. While this case may be viewed as no more than a recalcitrant student thumbing his nose at reasonable gym uniform requirements (which are reasonably related to the health and safety of students and staff), the fact is that this student was permitted, notwithstanding his incorrect uniform, to

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participate in the gym class and did so fully and satisfactorily, as measured by his high scores in both the fitness and skills tests. Although his gym garb deviated from the school colors, it apparently was sufficiently appropriate to allow him to participate. He was not considered to be unprepared by virtue of his incorrect uniform in the sense that he was precluded from meaningfully participating in his gym class. This is not a situation, as was the case in V.J.H., where a student's unpreparedness or absences precluded class participation and completion. In this case, petitioner fully participated: but for the Hawaiian shorts, he would have passed gym with flying colors. It may be that the Board should have prevented the petitioner from participating in gym class without the correct uniform, but it did not choose to do so and also did not impose any other form of discipline on him. Because the Board allowed the petitioner despite his uniform or lack thereof to participate fully and successfully in the gym class, it would not be equitable to impose a failing grade upon him on the basis of his incorrect uniform. Having permitted the petitioner to successfully participate throughout the school year despite his unreasonable recalcitrance as to the school uniform, the Board should not be permitted to discipline him with a failing grade. The Board need not tolerate a student's refusal to abide by reasonable regulations, but the equities in this case lie with allowing the student a passing grade on the basis of full participation in the class and successful completion of its requirements unrelated to dress. For these reasons, I **CONCLUDE** that petitioner should be awarded a passing grade for gym and be allowed to graduate with his class. Although, as the Board notes, petitioner could complete additional gym requirements and receive a diploma in the summer, he would have lost the opportunity to graduate with his class and in that sense would suffer some irreparable harm.

ORDER

On the basis of the above findings of fact and conclusions of law, it is **ORDERED** that petitioner's application for emergent relief be granted and that the respondent Board of Education award him a passing grade in gym and allow him to graduate with his class on June 17, 1988.

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This recommended order on application for emergent relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days from entry of this order. If Saul Cooperman does not so act in forty-five (45) days, this recommended order shall become a final decision in accordance with N.J.S.A. 52:14B-10.

June 14, 1988
DATE

RICHARD J. MURPHY, ALJ

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V.F., on behalf of A.F.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF HADDON HEIGHTS, CAMDEN COUNTY,	:	
RESPONDENT.	:	
	:	

This matter was opened before the Commissioner by way of petition and a motion for emergent relief seeking a determination that petitioner (A.F.) in this matter be awarded a passing grade for the 1987-88 school year in physical education and thereby be allowed to participate in graduation ceremonies and receive his diploma. Such application was grounded upon the contention that the policy of the Haddon Heights High School, which requires that all students wear a garnet and gold colored gym uniform or receive a deduction in the preparation portion of their grade, is arbitrary and unreasonable, serving no valid educational purpose. Further, petitioner argues that said policy requirement is unreasonable in that it uses grades as a disciplinary measure, citing V.J.H. v. Board of Education of the City of Orange, decided by the Commissioner July 23, 1987 in support of such proposition.

This matter was transmitted to the Office of Administrative Law where a telephone hearing was conducted on Thursday, June 9, 1988 with further opportunity being provided to the parties to submit additional certifications. On June 14, 1988 the presiding ALJ issued a recommended initial decision based upon facts which are summarized in the initial decision, ante, and which are incorporated herein by reference. The initial decision of the ALJ held that petitioner should be permitted to graduate because the Board permitted him to participate in gym activities and he did so successfully participate, despite his "incorrect" uniform. The ALJ's reasoning being summarized by the following finding:

> ***While this case may be viewed as no more than a recalcitrant student thumbing his nose at reasonable gym uniform requirements (which are reasonably related to the health and safety of students and staff), the fact is that this student was permitted, notwithstanding his incorrect uniform, to participate in the gym class and did so fully and satisfactorily, as measured by his high scores in both the fitness and skills tests. Although his gym garb deviated from the school colors, it apparently was sufficiently appropriate to allow him to

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> participate. He was not considered to be unprepared by virtue of his incorrect uniform in the sense that he was precluded from meaningfully participating in his gym class. This is not a situation, as was the case in V.J.H., where a student's unpreparedness or absences precluded class participation and completion. In this case, petitioner fully participated: but for the Hawaiian shorts, he would have passed gym with flying colors. It may be that the Board should have prevented the petitioner from participating in gym class without the correct uniform, but it did not choose to do so and also did not impose any other form of discipline on him. Because the Board allowed the petitioner despite his uniform or lack thereof to participate fully and successfully in the gym class, it would not be equitable to impose a failing grade upon him on the basis of his incorrect uniform. Having permitted the petitioner to successfully participate throughout the school year despite his unreasonable recalcitrance as to the school uniform, the Board should not be permitted to discipline him with a failing grade. The Board need not tolerate a student's refusal to abide by reasonable regulations, but the equities in this case lie with allowing the student a passing grade on the basis of full participation in the class and successful completion of its requirements unrelated to dress.
>
> (Initial Decision, ante)

Subsequent to the receipt of the ALJ's initial decision, a telephone conference call was held between a representative of the Commissioner and counsel for the parties relative to the establishing of a schedule for filing exceptions. During such conference call, the parties informed the Commissioner's representative that petitioner had failed another subject and therefore the issue of attendance at graduation ceremonies and receipt of a diploma were no longer at issue. The question of whether petitioner had been arbitrarily denied a passing grade in physical education and, therefore, whether he had to make up that course in summer school was, however, still a live issue which requires a determination. The Commissioner has reviewed the entire record in this matter including the tape of the telephone conference between the parties conducted by the ALJ. The Commissioner notes that counsel for the Board has filed exceptions to the initial decision. Specifically, the Board excepts to the interpretation drawn from the facts relative to the physical education grading policy. Petitioner contends that the ALJ improperly assumed that petitioner in this matter automatically lost nine points each time he was out of uniform. The Board points out that petitioner lost only two points for each time he was in improper uniform, the nine-point deduction being made only when an individual was entirely "out of uniform" and, thus, unable to participate in gym activities.

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This erroneous interpretation, contends respondent, led to the ALJ's conclusion that the Board should have prevented his participation in gym class if he were not properly prepared. The Board acknowledges that not permitting participation because of improper uniform, as opposed to being totally unprepared, would have been punitive and impermissible. The Board likewise dismisses "penalty-laps" as being an inappropriate manner of rectifying lack of preparedness.

Secondly, the Board contends that the ALJ erred when he found that the equities in this matter favor petitioner. The Board argues that the original failure on the ALJ's part to recognize the distinction between partial loss of credit for improper uniform as opposed to full credit loss of nine points for being without any uniform led him to conclude that it was inequitable to permit petitioner to participate but give him no credit for such participation. In fact, contends the Board, petitioner was given credit for his participation and received only the two-point deduction when not in proper uniform.

In summation, the Board contends the equities in this matter favor the Board and not petitioner for the following reasons:

1. A.F. had the correct uniform.

2. Exhibit C, The Basic Criteria for Grading, is published and announced.

3. A Progress Report (Notice to Parents and Students) was sent on October 9, 1987 from Ms. DiPaolo, indicating that A.F. was in danger of failing, disruptive, lack of serious attitude, insufficient preparation and that he had not been wearing the correct uniform to class.

4. A Progress Report (Notice to Parent and Students) was sent on December 9, 1987 from Ms. DiPaolo indicating that A.F. was in danger of failing, insufficient preparation and that he does not wear the required gym suit.

5. A Progress Report (Notice to Parent and Students) was sent March 4, 1988 from Ms. DiPaolo indicating that A.F. was in danger of failing and must achieve a 95 for the marking period to pass for the year.

6. A.F. was given the opportunity to improve his grade in gym by participating in a gym class in the fourth quarter.

(N.B. The Opinion at page 4 has a typographical error and should read that A.F. showed up for his first class of the fourth marking period in the incorrect uniform. See Affidavit of Ms. DiPaolo).

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> 7. The deduction of points for "Part of a Wrong Uniform" is an appropriate way to grade for lack of preparedness while at the same time allowing the student not to lose points for participation.
>
> 8. The gym uniform requirement is a reasonable one and the uniforms are related to a physical education purpose in that they allow for physical movement necessary to participation in gym. Additionally, given the length of time allocated to gym and the need for students to dress and undress quickly, the uniformity of dress is an aid to the teachers, in that it helps focus the students' attention on the gym activities rather than on each other.
>
> (Board's Exceptions, at pp. 3-4)

By way of reply to the Board's exceptions, petitioner contends that the ALJ's conclusion was not based upon an erroneous interpretation of the grading policy as contended by the Board in its exceptions but was, in fact, based upon an "'***impermissable (sic) use of grades as a disciplinary sanction." (Petitioner's Reply Exceptions, at p. 1) Petitioner contends that the ALJ had a firm grasp of the Board's grading policy and reached his conclusion strictly in conformity with the Commissioner's findings in V.J.H., supra. Petitioner contends that the undisputed facts are as follows:

> a. Petitioner was permitted to participate in gym class regardless of uniform he wore.
>
> b. Petitioner did participate in gym class.
>
> c. Petitioner participated very well, scoring admirably in physical fitness tests and skill tests.***
>
> d. But for his uniform, Petitioner would have received a passing grade in physical education. (emphasis in text)
>
> (Petitioner's Reply Exceptions, at pp. 1-2)

Petitioner's exceptions further contend that the ALJ's determination was not decided as a matter of equity but in conformity with the standards established by the Commissioner in previous decisions. Further reply exceptions to the Board's exceptions are as follows:

> 6. Just because "the Basic Criteria for Grading" was published and announced, that does not exempt such criteria from the rule of law.
>
> 7. That the school issued progress reports indicating that Petitioner was in danger of failing does not save the inpermissable (sic) grading criteria.

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8. Contrary to Respondent's assertion, Petitioner was not given the opportunity to improve his grade in gym by participating in a gym class in the fourth quarter, because when he showed up with an improper uniform, that opportunity was summarily withdrawn.

9. Respondent made the conclusory statement that the deduction of points for "part of a wrong uniform" is an "appropriate" way to grade, because it allows the student not to lose points for participation. This is specious reasoning, because under Respondent's policy, a student could participate on the level of an Olympic athlete, but fail the class for wearing the wrong color shorts.

10. Respondent's last argument, that a uniform requirement for gym is reasonable, is not at issue here. Petitioner does not ask the Commissioner to rule on whether or not a dress code is reasonable, nor did the Administrative Law Judge raise that as an issue. In fact, the Administrative Law Judge stated parenthetically (at the bottom of page 4 of his Opinion) that a reasonable gym uniform requirement may be reasonably related to the health and safety of students and staff.

If you examine page 2 of Exhibit "A" attached to Petitioner's initial Memorandum, you will note that students are required to purchase "a garnet and gold gym uniform that can be obtained at the school store." This raises another issue, in that it is improper for a public school to require students to purchase such equipment, especially when failure to do so results in a failing grade. (emphasis in text)
(Petitioner's Reply Exceptions, at pp. 3-4)

Based upon his independent review of the record and careful consideration of the arguments of the parties and the applicable case law and statutes, the Commissioner adopts the conclusion of the ALJ in this matter that Petitioner A.F. be deemed to have earned a passing grade in physical education. However, the Commissioner rejects the reasoning of the ALJ in regard to the reasons for reaching that conclusion.

Initially, the Commissioner notes that the ALJ failed to directly address the central argument raised by petitioner as to whether the Board's grading policy in physical education constituted the use of grades as a disciplinary measure. A close reading of the ALJ's conclusion could well provide support for the position of either petitioner or respondent.

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While the ALJ's citation of V.J.H., supra, does appropriately point out the Commissioner's long-standing position that grades may not be used as a matter of discipline, in this circumstance, the Commissioner's review of the Board's policy does not lead him to a conclusion that deducting points for lack of preparedness, whether partially or fully, constitutes an impermissible practice. Nor does he agree with petitioner that the policy which accords 70% of the grade to dressing and participation fails to adequately distinguish between the two and, thus, results in improper dress impacting upon the participation aspect. A review of Exhibit C attached to the petition in this matter does indicate that these two items may indeed be considered separately.

Consequently, the Commissioner finds and determines that the aforesaid grading policy is neither arbitrary nor capricious. However, the issue as to what constitutes a proper gym uniform or an improper one which would justify the application of the grading policy to the detriment of petitioner in this matter is a question that the Commissioner must address. Although argued only inferentially by the parties and raised definitively as an issue by petitioner only in his reply exceptions, the Commissioner cannot ignore an aspect of the Board's policy relative to gym uniforms which stands squarely in contravention of law. The Commissioner notes that page 2 of Exhibit A submitted by petitioner in this matter, which sets forth the policies of the physical education department as to gym uniforms, provides as follows:

> Students will be required to purchase a garnet and gold gym uniform that can be obtained at the school store. (emphasis supplied)

In this regard, the Commissioner notes that it is well-settled by the New Jersey Constitution, applicable statutes and case law that a thorough and efficient education "free of cost" is the constitutional right of every person in the State of New Jersey between the ages of five and eighteen. (See New Jersey State Constitution, Article VIII, Section IV, paragraph 1.)

Further, N.J.S.A. 18A:38-1 and N.J.S.A. 18A:34-1 respectively provide:

> Public schools shall be free to the following persons over five and under 20 years of age***. (emphasis supplied)

> Textbooks shall be selected by the recorded roll call majority vote of the full membership of the board of education of the district and they and other school supplies shall be furnished free of cost for use by all pupils***. (emphasis supplied)

It is likewise well-settled in case law that students may not "be required to bear the costs of school programs***and such other activities as are part of the regular classroom program of instruction or course of study***." See Melvin C. Willett v. Board

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of Education of the Township of Colts Neck, 1966 S.L.D. 202, 206. Although the Legislature subsequently altered State law to permit parents to bear the cost of field trips that exception is clearly limited to field trips and the statutes in question very carefully require that:

> No student shall be prohibited from attending a field trip due to inability to pay the fee regardless of whether or not they have met the financial hardship requirements set forth in section 1 of this act***. (N.J.S.A. 18A:36-23)

While the Commissioner does not question the right of the Board to require students to bring in and wear a clean pair of shorts and a T-shirt, he does find that the requirement that students wear a particular set of shorts and shirt, which they must purchase in order to receive a passing grade in a class which is part of the regular school program, is inconsistent with law and, thus, ultra vires. Consequently, in the instant matter, since it is unquestioned that petitioner would have passed physical education were it not for the fact that he wore on numerous occasions a gym uniform which was inconsistent with the aforesaid policy, the Commissioner directs that petitioner's grade be changed to whatever his numerical average would have been were he not penalized for wearing other than the "approved" uniform.

In reaching the aforesaid conclusion, the Commissioner wishes to make clear that he renders this determination with extreme reluctance given the obvious recalcitrance and obdurate behavior on the part of petitioner in this matter. From the factual recitation as contained herein, it appears clear that petitioner was not motivated by principle in refusing to conform to the uniform requirement but displayed an arrogance and disdain for authority which does not deserve reward. Nonetheless, the majesty of our system of laws is in the very fact that it protects those whose behavior does not measure up to our best standards as well as those who do.

COMMISSIONER OF EDUCATION

June 28, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5774-87
AGENCY DKT. NO. 257-8/87

JOAN M. BURKE,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF UNION BEACH,
Respondent.

Stephen B. Hunter, Esq., for petitioner (Klausner, Hunter & Oxfeld, attorneys)

Louis E. Granata, Esq., for respondent (Yacker & Granata, attorneys)

Record Closed: April 4, 1988 Decided: May 16, 1988

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

Joan M. Burke, petitioner, alleges and the Union Beach Board of Education (Board), respondent, denies that the Board violated the petitioner's tenure and seniority rights when it refused to employ her as student assistance counselor while she was on the school social worker preferred eligible list.

PROCEDURAL HISTORY

The petitioner opened this matter by filing a verified petition of appeal with the Commissioner of Education on August 11, 1987. The respondent Board of Education filed an answer on August 21. On August 25, the Department of Education transmitted the matter to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

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After notice, a prehearing conference was held on October 6, 1987. Among other things, it was agreed that the issue to be resolved is whether the student assistance counselor position is the same as or substantially the same as the school social worker position and, if so, to what relief the petitioner would be entitled. It was further agreed that the petitioner would try to establish that her tenure rights were violated when she was not appointed to the student assistance counselor position. The matter was set down for hearing on February 9, 1988, at which time it was heard in the Aberdeen Municipal Court. The parties filed posthearing submissions, the time for which, for good cause, was extended and the record closed on April 4, 1988.

PAROL AND DOCUMENTARY EVIDENCE

Stipulated and uncontroverted facts established that the Union Beach Board of Education retained Lynn Dash, a nontenured social worker, to fill the position of student assistance counselor within the Union Beach School District without offering that position to Joan Burke, who had acquired tenure as a school social worker pursuant to N.J.S.A. 18A:28-5. Burke had been advised by the superintendent of schools that she would be the subject of a reduction in force effective at the conclusion of the 1986-87 school year. The Board, on or about June 25, 1987, posted a notice of vacancy for the position of student assistance counselor (P-1). Because the precise title, student assistance counselor, is unrecognized, that is, not a category specified in N.J.A.C. 6:3-1.10, the Board had to receive approval from the Monmouth County superintendent of schools to use the title and had to secure the county superintendent's determination of the appropriate certificate the person appointed to the position must possess (P-2, R-25).

Burke testified that she possessed all of the requirements for the position of student assistance counselor. She established not only her degrees and certificates but her extensive experience in counseling and therapy.

The Board's director of special services advised the new superintendent on July 16, 1987, that it was the director's opinion that Burke did not fulfill all of the requirements for the position because he believed her area of concentration in her master's degree program was administration (R-19). Nevertheless, the director's testimony did not conflict with Burke's testimony concerning her fulfillment of substantially all performance responsibilities in the job description for student assistance counselor.

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The Board adduced testimony tending to show that the counselor position differed in some respects from the social worker position. The Board offered that the counselor would have to work with community persons, help teachers, implement drug and alcohol instruction and be available on a 24-hour basis for crisis intervention. At some point in the mid-1980's, the Board determined the need for intensive counseling to children and community members separate and apart from the child study team. The student assistance counselor is independent of the child study team although, obviously, there is some cooperation between the two.

Prior to the reduction in force, there were seven child study team positions: one director, two learning disability teacher consultants, two psychologists and two social workers. Upon the reduction in force, there was one learning disability teacher consultant position, one psychologist position and one social worker position. The former director assumed the remaining social worker position.

At approximately the same time of the reduction in force affecting Burke, the Board advised a nontenured social worker that her contract would not be renewed for the 1987-88 school year because of budget constraints.

Burke, being tenured, was placed on a preferred eligible list. Nevertheless, the Board retained the nontenured social worker for the newly-created but unrecognized position of student assistance counselor. As illustrated by exhibit R-25, this position has been coded and classified by the county superintendent of schools as a school social worker position. N.J.A.C. 6:3-1.10(g); N.J.A.C. 6:11-3.6.

The Board also adduced testimony tending to show that it posted the notice of vacancy for the student assistance counselor position clearly stating the position was to begin July 1, 1987. Burke was in the schools until June 30, 1987, when her contract expired. Dash was the only person to respond and submit an application. The Board acted on the only application it received and entered into a contract with Dash on July 7, 1987. One week later, Burke delivered an application for employment dated July 7, to the Board (R-18).

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In the application, Burke referred to the letter of April 10, 1987, placing her on a preferred eligible list for reemployment and her belief that she was a "suitable and qualified candidate." The superintendent took the time to review Burke's application and to review her qualifications, knowing the position had already been awarded to Dash. He discussed the matter with the director who had been Burke's supervisor while she was employed. The director reviewed the transcripts of both Dash and Burke and determined that Burke was not qualified for the position by reason of not meeting requirement no. 3 (R-19). Requirement no. 3 is "successful graduate studies, concentration in counseling and psychotherapy."

The Board denies the claim that the student assistance counselor position is the same as a school social worker position. The Board also asserts that the petitioner is not qualified for the student assistance counselor position. The Board also urges that the mere fact that it must code Dash as a school social worker in the personnel section of its annual report does not support the conclusion that the county superintendent of schools has classified the position as school social worker.

DISCUSSION AND DETERMINATION

A point-by-point comparison of Burke's and Dash's resumes with the job description of student assistance counselor suggests that Dash's background more nearly matches the job description. At the same time, however, it cannot be said that Burke is unqualified. Moreover, Capodilupo v. W. Orange Tp. Ed. Bd., 218 N.J. Super. 510 (App. Div. 1987), provides clear instruction in matters such as this. In Capodilupo, a tenured secondary school physical education teacher was held to be entitled to reinstatement, following a reduction in force of teaching staff, to an elementary school physical education position for which he was certified but in which he had no experience. Capodilupo and the related case of Bednar v. Westwood Bd. of Educ., 221 N.J. Super. 239 (App. Div. 1987), make clear that tenure is a much stronger concept than seniority.

It is well settled that seniority does not come into play until and unless there is a reduction in force. See, e.g., Howley v. Ewing Bd. of Ed., 6 N.J.A.R. 509 (1982). There is no fine point of law here. When a position lies within the scope of the certifications of two teaching staff members, one of whom is tenured and the other is not, the tenured teacher prevails.

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The only question that remains in the present case is whether the late application filed by Burke somehow works to bar her appeal. I **FIND** that it does not. The Union Beach Board of Education had a responsibility to determine upon effecting the reduction in force, and upon every subsequent posting, those persons on preferred eligible lists entitled by virtue of their certifications to first consideration for any subsequent opening. Therefore, notwithstanding the petitioner's late application, her appeal remains viable.

For the foregoing reasons, I **CONCLUDE** that the Union Beach Board of Education has violated the tenure rights of Joan M. Burke by employing a nontenured teaching staff member to perform the functions of a position within the scope of the petitioner's certification. Accordingly, I **ORDER** Joan M. Burke instated to the position of student assistance counselor retroactive to September 1, 1987. I further **ORDER** all back pay and other emoluments of employment, including, but not limited to adjustment of all Teachers' Pension and Annuity Fund payments.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

16 MAY 1988
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

MAY 17 1988
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAY 19 1988
DATE

OFFICE OF ADMINISTRATIVE LAW

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JOAN M. BURKE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF UNION BEACH, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were timely filed by the Board as were petitioner's reply exceptions.

The Board takes exception to the ALJ's determination that petitioner is qualified for the disputed position of student assistance counselor and that her application for such position is not barred as untimely. More specifically, it argues that pursuant to N.J.S.A. 18A:28-12, petitioner should have been reemployed only if the controverted position was one for which she was qualified and details how she did not meet certain of the job description qualifications and the functional differences between the position of social worker and that of student assistance counselor. The Board also reiterates its arguments that her appeal should be barred as the time frame of events alone makes the ALJ's finding ludicrous as the position had been filled already when petitioner filed her application.

Upon review of the record in this matter, the Commissioner determines that the ALJ is correct in determining that Capodilupo, supra, and Bednar, supra, are controlling in this matter. Moreover, the decision is consistent with the State Board's decisions in Constance Johnson v. Bd. of Ed. of City of Englewood, decided May 13, 1985, aff'd State Board October 1, 1987 and South River Education Association v. Bd. of Ed. of Borough of South River decided September 9, 1985, rev'd November 4, 1987 which stand for the proposition that qualifications established by a board which are beyond those of certification may not serve to thwart an individual's tenure and seniority rights.

N.J.A.C. 6:11-3.6 mandates that:

> 6:11-3.6 Assignment of titles
>
> (a) District boards of education shall assign position titles to teaching staff members which are recognized in these rules.

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> (b) If a district board of education determines that the use of an unrecognized position title is desirable, or if a previously established unrecognized title exists, such district board of education shall submit a written request for permission to use the proposed title to the county superintendent of schools, prior to making such appointment. Such request shall include a detailed job description. The county superintendent shall exercise his or her discretion regarding approval of such request, and make a determination of the appropriate certification and title for the position. The county superintendent of schools shall review annually all previously approved unrecognized position titles, and determine whether such titles shall be continued for the next school year. Decisions rendered by county superintendents regarding titles and certificates for unrecognized positions shall be binding upon future seniority determinations on a case-by-case basis. (emphasis supplied)

In the instant matter, the record reveals that approval of the county superintendent was received for the use of the title but after Ms. Dash's appointment which is contrary to the above-cited regulation. (R-25) Examination of the job description for the disputed position (Attachment B, Joint Stipulation of Facts) indicates the Board anticipated certification as school social worker, school psychologist or school counselor would be appropriate for it. A review of R-25 indicates that while the approval letter does not specifically state that school social worker is the only certificate appropriate to the position, it is quite clear nonetheless that that particular certificate is in fact at least one such appropriate certificate.

Given this factor, it is, therefore, determined that the Board violated petitioner's tenure rights when it retained a non-tenured teaching staff member with social worker certification to fill the position of student assistance counselor. It is of no moment that the nontenured teaching staff member may have possessed desired qualifications beyond possession of appropriate certification, as such additional qualifications cannot defeat tenure and seniority entitlements. Johnson, supra; South River, supra

Further, the Commissioner determines that the ALJ is entirely correct in determining that the Petition of Appeal is not time barred because Ms. Burke applied for the disputed position after the Board had acted to appoint Ms. Dash. Petitioner had a statutory entitlement to the position by virtue of her tenure status; therefore, no obligation to apply for said position existed. It was the Board's duty to recognize her tenure status and notify her of the fact it was available to her. As the filing of

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the petition in this matter was well within the 90-day filing requirement of N.J.A.C. 6:24-1.2, no basis exists to deem it time barred nor is such a claim advanced by the Board.

Accordingly, the ALJ's recommended order is adopted for the reasons stated in the initial decision as clarified herein. Therefore, petitioner is to be reinstated to the position of student assistance counselor with all back pay, less mitigation, emoluments and benefits owing and due her as though she had actually served in such position.

COMMISSIONER OF EDUCATION

June 29, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2598-88
AGENCY DKT. NO. 56-4/88

IN THE MATTER OF THE INQUIRY INTO THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE CITY OF PASSAIC, PASSAIC COUNTY

Walter J. Tencza, Esq., for petitioner, Andrew Gentile, Jr.
(Tencza & Korduba, attorneys)

Matthew J. Michaelis, Esq., for respondent, Board of Education of the City of Passaic
(Michaelis & Michaelis, attorneys)

Richard P. Blender, Esq., for intervenors, Mary L. Guzman, Manuel Fuentes and Pedro P. Cancel, Jr.

Record Closed: May 4, 1988 Decided: May 17, 1988

BEFORE **STEPHEN G. WEISS,** ALJ:

This is a school election case which was transmitted to the Office of Administrative Law by the Commissioner of Education and received on April 13, 1988. The petitioner, Andrew L. Gentile, Jr., an unsuccessful candidate, challenges the results of the annual school election held in Passaic on April 5, 1988, and has asked for an inquiry. He maintains that the results of such an inquiry will reveal that he should be declared one of

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the three successful candidates, or at least that a new election be held in certain polling districts. See, N.J.S.A. 18A:14-63.12, N.J.A.C. 6:24-6.1 et seq.

Following transmittal of the case to the Office of Administrative Law, an application by Gentile for a stay to preclude the three successful candidates from being sworn, and from participating in Board affairs, was denied. An order denying a stay was entered by me on April 20, 1988. In view of the particular nature of the case, and the need for as prompt a decision as reasonably possible, a plenary hearing was held in Newark on April 28 and 29, 1988. In the interim, at the direction of the undersigned administrative law judge, the parties engaged in as much discovery as time would permit. In addition, a motion to intervene was made on behalf of the three successful candidates, Guzman, Fuentes and Cancel, which was granted without objection.

Before discussing the testimony and evidence offered at the hearing, it is appropriate to note initially that a recount with respect to the school election also had been requested by Gentile, and an authorized representative from the Office of the Passaic County Superintendent of Schools undertook the same on April 13, 1988. See, N.J.S.A. 18A:14-63.2. As a result of that process, a report was submitted to the Commissioner by the representative in which the original count for the top four candidates remained unchanged. However, in his decision on the recount the Commissioner also listed a variety of irregularities which his representative found to have occurred. See, IMO the Annual School Election Held in the School District of the City of Passaic, Passaic County, # 72-4/88 (April 27, 1988) pp. 3-5. Accordingly, the Commissioner determined to transmit those findings to the Office of Administrative Law so they could be considered by me and incorporated into this initial decision. Such a transmittal is not unusual for it is, "entirely appropriate for such decision [the recount] to be issued and transmitted to the ALJ conducting the inquiry since the purpose of the recount is to certify the actual count, while the purpose of the inquiry is to determine whether improper election procedures influenced that count." See, In the Matter of the Annual School Election Held in the School District of Shamong Township, Burlington County, OAL DKT. EDU 2914-86, Comm'r's Decision (October 8, 1986) p. 17 (emphasis supplied). Accordingly, the Commissioner's recount decision of April 27, 1988, is incorporated in this determination and will be annexed hereto as Appendix A.

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TESTIMONY FOR PETITIONER

The lead witness for Gentile was John Zeug, the Passaic County School Business Administrator, whose duties include the supervision of school election recounts. It was Zeug who conducted the recount of the April 5, 1988 Passaic school election. As a result of the recount, the final tally determined by Zeug with respect to the ballots cast for candidates for three-year terms was as follows:

THREE-YEAR TERM	AT POLLS	ABSENTEE	TOTAL
Mary L. Guzman	1376	8	1384
Manuel Fuentes	1343	17	1360
Pedro P. Cancel, Jr.	1262	18	1280
Andrew L. Gentile, Jr.	1257	22	1279
Louis Salerno	1141	65	1206
Charlie Allen	1118	43	1161
Andrew Conklin	795	23	818

Zeug generally is familiar with the statutes pertaining to school elections and is aware that among other requirements voters are expected upon entering the polling place to write their names and addresses, sign the poll list and, where pertinent, sign a voter authority, a portion of which then is given to the voter to hand to the election worker manning the particular voting machine.* With respect to the Passaic school election Zeug identified various composition-type books which had served as the poll lists in particular districts (Exhibits P-1 id, P-1A id, P-2 id, P-2A id, P-3 id, P-3A id).** According to Zeug,

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*The school election statutes do not, themselves, specifically mention "voting authorities." However, their use is covered in N.J.S.A. 19:52-2.1 and under N.J.S.A. 18A:14-56, the use of voting machines shall be in accordance with Title 19.

**In view of the fact that these books were the original poll lists for purposes of convenience and security, they were retained by Zeug as part of the records of the Office of the Passaic County Superintendent of Schools. Copies of each of the exhibits were then substituted for them (Exhibits P-4, P-4A, P-5, P-5A, P-6, P-6A).

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if the proper procedure were followed, the voter would sign his or her name and address in the poll list and an election worker would compare that signature to the signature contained in the signature copy register provided by the County Board of Elections for use at the school election. See, N.J.S.A. 18A:14-48 through 14-51.1.

As part of the recount procedure he conducted, Zeug compared the number of votes appearing on the machine counters to the signatures in the poll lists and to the number of voting authority slips for various polling districts. In undertaking this examination with respect to the poll lists and the voting authority slips, as compared with the numbers of votes appearing on the machine counters, a number of irregularities were found. Those irregularities were specifically set forth on pages 3 to 5 of the Commissioner's recount decision of April 27, 1988, and are as follows:

1. The Superintendent of Elections was unable to provide the pre-protective counter numbers for the voting machines. He stated that the return envelopes that identify the machine and pre-protective counter numbers were not returned to the Superintendent of Elections. The keys were returned in a single envelope with no identification. The log book was not available to ascertain the pre-protective counter numbers for the voting machines in question.

2. The poll lists did not indicate the polling district number or the number of the machine.

3. In most polling districts, two separate poll lists were used with one designated for voters' names beginning with A-K and the other with L-Z. Thus the sequence of the ballot numbers was not in sequence. Also, a number of names were scratched out of one book and rewritten in the other book.

4. Specific poll list irregularities are as follows:

   a. Polling District No. 3 at School #10 had three names scratched out of the A-K book and rewritten in the L-Z book.

   b. Polling District No. 2 at School #8, count of names on the poll lists is 234, not the 238 listed on the Statement of Result. The number of voting authority slips used is 238 and the public counter on the voting machine is 238. It appears that four (4) more people voted than signed the poll list. In the A-K poll list, 002 has no signature. In the L-Z poll list, no address is listed for 016, Carmen Rodugs, nor for 017, Antonio Sepulveda, nor for 155, Pedro L. Ledesna. The listing next to ballot 120 is blank.

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c. Polling District No. 10 at School #1, poll list count of names is 476. Barbara Lucianine has no ballot number listed next to her name. The public counter is 475 and 475 voting authority stubs are on the string. Therefore, it appears that Barbara Lucianine signed the poll list but did not vote. (About 10 names were scratched out but appear on the alternate book.)

d. Polling District No. 5 at School #4, count of names on the poll list is 273. The report of the election worker on the Statement of Result is 275. The public counter is 275 and 275 voting authority slips are on the string.

e. Polling District No. 13 at School #6, count of names on the poll list is 336. The report by the election worker on the Statement of Result is 334. The public counter is 334 and 334 voting authority slips are on the string. Mr. Ritcher, defeated candidate who requested the recount, stated that names appearing on the poll list next to ballots 134, 136, 138, 139, 140, 141, 142 all appear to be in the same handwriting.

f. Polling District No. 7 at School #7, count of names on the poll list is 314. The report by the election worker on the Statement of Result is 315. The public counter is 315 and 315 voting authority slips are on the string. It appears that someone did not sign the poll list.

g. Polling District No. 14 at the Ukranian Center, poll list appears to have all of the names printed by the election worker rather than signatures of the voters. However, it appears as though the signatures in the voting authority books are those of the voters and could have been used for comparison purposes with the Signature Registers.

j. Polling District No. 6 at School #11, count of names on the poll is 359. The report by the election workers on the Statement of Result appears to be 368 for numbers of signers on the poll list and 360 for the number of ballots counted. The public counter is 359 and #360 voting authority slip is on the string. Voting authority slip #359 appears to have been voided in that the number is skipped in the poll list but the authority to vote slip #359 does not appear in the sealed packet. Also, there is no notation in the Statement of Result as to any voided ballots.

Zeug noted that the ballot positions on the machines were as follows: Gentile—No. 1, Allen—No. 2, Guzman—No. 3, Cancel—No. 4, Conklin—No. 5, Salerno—No. 6 and

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Fuentes--No. 7. According to Zeug, neither he nor anyone else on behalf of the Commissioner made any effort to compare any of the signatures. Zeug also noted that preelection seminars were conducted in various parts of Passaic County and instructions given to the attendees concerning their duties and obligations. He described the voter authority process as requiring the poll worker to print the individual's name on the upper part of the stub and the voter was to sign his or her signature on a line beneath that printed name. One purpose for doing this would be to compare the signatures on the voter authority with the signature copy register. Zeug then identified several bound voting authority pads for polling district no. 6 (Exhibit I-1), polling district no. 14 (Exhibit I-2), polling district no. 13 (Exhibits I-3, 3A, 3B, 3C and 3D) and polling district no. 6 (Exhibits I-4, I-4A and I-4B).

The next witness called by petitioner was Karl Schaffenberger, who was qualified without objection as an expert in analyzing handwriting. Schaffenberger had examined composition books which served as the poll lists in some of the districts, including district no. 14 (Exhibits P-4 and P-4A), district no. 13 (Exhibits P-5 and P-5A) and district no. 6 (Exhibits P-6 and P-6A). With respect to the composition books which served as the poll list in district no. 14, it was his opinion as the result of an analysis he made of the signatures he found in those two books that they were all made by the same person.* With respect to the two composition books comprising the poll list maintained in polling district no. 13 (Exhibit P-5, P-5A), it was Schaffenberger's opinion that in the "A-K" book, one person wrote 18 of the signatures, another person wrote 18 of the other signatures and a third person wrote 52 of the signatures. In the "L-Z" book (Exhibit P-5A) one person wrote 59 of the signatures, one person wrote nine of the signatures and one person wrote one signature and had also been one of the persons who wrote 18 of the signatures appearing in Exhibit P-5, the A-K book.

Schaffenberger then identified a photocopy of a voter authority which contained the printed name "Pablo Febres" and what purports to be a signature of one "Pablo Febres" (Exhibit P-7). This voter authority was contained in a bound pad used in polling district no. 13. Schaffenberger compared the signature of "Pablo Febres" appearing on the stub

*Actually, each of the "signatures" was printed.

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to the signature appearing in the signature copy register at the Passaic County Board of Elections. He found that the Pablo Febres who resides in polling district no. 13 at the appropriate address was illiterate, in that his signature in Passaic County records was an "X."

Finally, with respect to the two composition books which served as the poll list in polling district no. 6 (Exhibits P-6, P-6A), Shaffenberger noted that a total of 65 of the names contained therein did not include the voter's address, and three of the names simply indicated that their address was in "Passaic."

On cross-examination, Schaffenberger listed some of the elements he looks for in attempting to make handwriting comparisons—how the individual wrote capital letters, lower case letters, numbers, the proportions between and among letters, etc. He said he also takes into account the use of punctuation, placement of the information on the page, style and so forth. With respect to Exhibits P-4 and P-4A, of course, he had little difficulty in arriving at a determination since the fact that the same person printed all 84 of the names was "easy to spot." With respect to the composition books which served as the poll list in polling district no. 13 (Exhibit P-5, P-5A), his ability to analyze these two was "a little more complicated." Nevertheless, he was convinced that only three persons wrote many of the signatures. Although Schaffenberger did not systematically compare all the signatures of individuals on the voter authorities with all the signatures in the poll list, or with the signature copy register, he did compare by way of "spot check" a few of the signatures and found that none matched. Schaffenberger readily agreed with Board counsel that he would like to have had more time so that he could have compared all of the signatures with the signature copy registers. Also, he agreed that with respect to the Pablo Febres signature appearing on the voter authority (Exhibit P-7), he had not attempted to obtain any handwriting samples from the poll workers in that district to see whether there was a match.

The next witness was Sharon Griggs, who voted on election day at School No. 6 (polling district no. 13). According to the witness, she voted there sometime between 4 and 5 p.m. on April 5, 1988. While in the polling area she observed a Hispanic woman in

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front of her. A poll worker told the woman she could not find her name, and the lady then replied, "but me gonna vote anyway." At that point an individual Griggs believed to be the woman's husband came up, the worker gave him a voter authority and the couple went into the voting booth together. Griggs did not see the woman sign anything at anytime. When she came up to the desk to sign her own name, Griggs had to find it for the worker in the signature copy register. She signed a voter authority but not the poll list.

On cross-examination, Griggs was shown what purported to be her signature on a poll list maintained at district no. 13 (Exhibit P-5). She said it was not her signature and believed it was a poll worker who placed it in the book. All Griggs signed was the voter authority. On redirect examination, she reiterated that as far as she observed, no election worker ever bothered to compare her signature with the signature copy register.

Beatrice Williams voted on school election day at about 5 p.m. at polling district no. 13. She recalled there were many people in the area, and when she stepped up to the table, she was given a voter authority to sign. She did not see, nor did she sign, any poll list. At no time did Williams observe the worker make any effort to compare her signature with the signature copy register.

Williams also complained that while she was in the polling area preparing to vote an individual who she described as a young man was handing out literature and talking to people in Spanish while pointing at the voting booth. She said he wore glasses and she learned later that his name was "Ozzie something." She claimed that he had pieces of "blue paper" with some candidates names on them which he was giving to people as they came into the polling area. She also specifically recalled he was calling out, in Spanish, the numbers "three," "four" and "seven." Williams was then shown a photograph appearing on page A-4 of the Wednesday, April 6, 1988 edition of the North Jersey Herald and News (Exhibit P-10). She pointed to an individual wearing glasses on the extreme right of the photograph and identified him as the "Ozzie" she previously had described.

On cross-examination, Williams was shown what purported to be her signature in the poll list book and said it was not hers—that the "lady at the table signed my name" and

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this was shocking to her. However, she did not protest at the time. She agreed that she did sign a voter authority before voting.

The next witness for petitioner was Tracey Bell, who voted at polling district no. 13 on the morning of April 5, 1988. Bell was the campaign manager for Charlie Allen, one of the unsuccessful candidates. While she was at the polls that morning the scene was "calm." Later that day (about noon) she returned to the polling area, where her sister, Theresa Bell, who was a poll worker, pointed to one of the candidates (Guzman) and claimed she had been cheating right in front of the school.*

Tracey Bell returned to the polling area at about 5 p.m. and found the area to be crowded and chaotic. She said there was a man there who was taking blue slips of paper from his pocket and showing them to people as they were coming into the room. He was speaking Spanish and she distinctly heard him speak in Spanish the numbers "three," "four" and "seven" while he was standing right by the voting machine. She identified the individual as Ozzie Maldonado.

Lottie Bell, the mother of both Theresa Bell and Tracey Bell, was the next witness for petitioner. She, too, voted at polling district no. 13. However, earlier in the day she was at Allen headquarters, where she gave out worker assignments. At about 10:15 or 10:30 a.m., her daughter Theresa called to complain that there was "chaos" at School no. 6, that people were "taking over the books." As a result, the witness called the office of Board Secretary/School Business Administrator Samuel G. Jarkesy. She spoke with Jarkesy's secretary and told her to tell Jarkesy (who was not there) about irregularities occurring at School No. 6. Having received no return call or other information, Ms. Bell called Jarkesy's office at about 12:15 and again spoke to his secretary. The witness said she was extremely upset and insisted that someone had better go to the polling place in order to check out the situation. The witness then testified that the secretary advised her that the message would be relayed to Jarkesy. Bell later called a third time and was still unable to reach Jarkesy. However, she asked to have the police assigned to keep law and

*Theresa Bell executed two separate affidavits which were attached to the inquiry request filed by Gentile pursuant to N.J.S.A. 18A:14-63.12. However, she was not called as a witness at the hearing.

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order at the school. At no time did either Jarkesy or his secretary ever call her back. When she later went to the polling district to bring sandwiches to her workers, everything appeared quiet.

On cross-examination, Ms. Bell indicated that she is the sister of Charlie Allen. She agreed that she never called the police, but she did instruct her daughter Theresa to do so.

The next witness was Patricia Wilson who voted at School No. 11 (polling district no. 6). Wilson maintained that a Hispanic gentleman in the polling area had a card with the candidates names on it and that another Hispanic individual, who was a poll worker, was telling people who to vote for, by pointing to two of three names on the card. According to Wilson, the card contained the names of two Hispanic candidates and Allen. She told the poll worker that such conduct was improper and that persons should not be told for whom to vote.

The next witness, Lonnie Bogan, voted at polling district no. 13 late in the afternoon on April 5. He explained that when he went to vote there was some sort of a mixup—he signed what he described as a "white slip," but the poll worker took it back and asked him to sign another one. He did so and then voted.

Tanisha Thompson, the next witness for petitioner, is 15 years of age and was working in Allen's campaign at School No. 6. Although she was outside most of the time, she did go into the building, where on one occasion she observed two persons go into the voting booth at the same time. One showed the other what to do, and then stepped out. According to Thompson, the "helper" was giving numbers to the other person. While inside the voting area, Thomspon also observed an incident. A male was told his name could not be found in the register, but he returned five minutes later and signed a voter authority slip. Another individual, wearing glasses, was in the area calling out the numbers "three," "four" and "seven" in Spanish while standing about 15 feet or so away from the voting booth. At 9 p.m. that evening she saw the same person (who she also identified as Ozzie Maldonado from the newspaper photograph) calling out numbers and names from the back of the machine.

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Marlene Sullivan went to School No. 3 (polling district no. 9) to vote between 2 and 3 p.m. She signed both the poll list and a voter authority. When she asked the election worker if her signature was to be checked with the signature copy register, the poll worker replied, "no, not in this election." On cross-examination, Sullivan was unable to identify the name of the poll worker who gave her this information.

Betty Grier voted at School No. 11, although she had first gone to another school where she was told that her name was not to be found in the book. When she went to vote at the appropriate polling district, she observed one of the poll workers go into a booth with a couple, both of whom had signed voter authorities. The poll worker then came out of the booth leaving the couple inside. The curtain, she said, opened and closed twice.

Donna Mickolajczyk voted at School No. 3 (polling district no. 9) at about 7:30 p.m. on April 5, 1988. When she came up to the table to sign, a female election worker behind the table said to her "you're a Mickolajczyk." She said she was, whereupon the worker handed her the poll list in which to write her name and address. She also signed a voter authority. At no time, however, did the worker even look for her name in the signature copy register to see whether she was a registered voter.

While in the polling area, Mickolajczyk also observed a man go into a booth and remain there for several minutes. A male election worker then went inside to help him, and she heard the voter say he wanted to vote for candidate Cancel. The worker then told the voter to pull down lever number four.

Mickolajczyk said her mother also voted at the same time as she and no effort was made by the election worker to determine whether the mother or the individual standing behind her were even registered voters. As she put it, the books were "never opened."

Mickolajczyk further asserted that at about 8:15 to 8:20 p.m. on election day she was sitting outside the school and observed an individual whom she knew to be an election worker (Lillian Gold) leaving the school carrying what Mickolajczyk described as the "large book from the county." She believed she saw what appeared to be a strap hanging down from the book, the sort which is used for the signature copy registers.

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On cross-examination, Mickolajczyk conceded that she worked for Gentile and Allen, as well as Fuentes, in connection with the election. She is also the current president of the Passaic Education Association. She recognized Gold since she has known her for about 16 years. When Gold left the building she came within 10 to 15 feet of the witness. The book she was carrying was described by Mickolajczyk as being about 12 inches by 15 inches—the same size and color of a signature copy register.

The next witness for Gentile was Alice Bell. She, too, worked on Allen's campaign and voted at School No. 11 (polling district no. 6). At about 8:50 to 8:55 p.m. on April 5, 1988, she came to the school in order to be there for the count. A male came in to vote at that time and, according to Bell, was given a "tally slip." However, it appeared that he was given the wrong number and the poll worker, one Jackie Porter, said she would void it out (no. 359) and would give him no. 360 instead.*

When it came time to close the polls and to count the votes, Bell observed that there was confusion as to who had the key. At that point, an individual who she knew to be a school custodian came into the room and said he had been given the key by Jarkesy. However, he refused to become involved in the count and handed over the keys to someone else.

The next two witnesses called by petitioner were two of the successful candidates whose election was being challenged—Mary L. Guzman and Pedro P. Cancel, Jr. Both were asked whether or not they had complained about election irregularities and they denied doing so.

Victor Frias, a member of the Passaic County Board of Elections, said he served as a challenger for Allen at the election. Frias went to vote at School No. 10 (polling district no. 3) in the early afternoon where he observed a Hispanic woman who he believed to be one Felecia Perez go into a voting booth accompanied by another female who told her

*Exhibit I-1, a bound voter authority pad used in polling district no. 6 and containing stub numbers 301-360 reveals that stub no. 359 was blank and someone had written in ink across the face of it the word "none." Stub no. 360 had the printed name "Jorge L. Estevez" and, the signature of a voter on it.

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what to do. He heard the individual tell Perez, "do this, do that." When Frias confronted the "helper" and told her it was wrong, the individual replied that Perez had simply asked for her glasses and that is why she went into the booth with her.

Frias said he also observed Ozzie Maldonado within ten feet of a polling booth advising persons who entered the area for whom to vote. While he did not actually mention any name or number, he said, "you know who to vote for." Frias told Maldonado to cease the practice. Although he said he served as a "challenger," Frias did not obtain authorization to do so from the school board secretary. See, N.J.S.A. 18A:14-15 et seq.

The last witness called by petitioner was Secretary/Business Administrator Jarkesy. He has served in that position since February 1983 and prior thereto was a principal in Passaic.

With regard to phone calls received at his office complaining of problems at the polls, Jarkesy said his secretary did receive some messages from someone who was upset about problems occurring at polling district no. 13—School No. 6. Jarkesy was out of the office, and when he returned at about 12:30, his secretary told him the caller had alleged that there were "problems" and had called twice. The first time she left no name or number, but she did the second time. Jarkesy instructed his secretary to call the police and have them go to the polling district and talk to the judge of elections. Jarkesy went to the polls himself later that afternoon and all appeared to be in order.

Jarkesy said he did not assign any security people to the polls, or ask the police in advance to help out. With respect to the maintenance of keys to the machines, he agreed it is the responsibility of duly designated election workers to retain the key, and he does not know how a school custodian came to have possession of one, if that was the case.

On cross-examination by counsel for the Board, Jarkesy repeated that he observed no improprieties at the election. When cross-examined by counsel for the intervenors, he repeated he gave no keys to any school custodian and pointed out that all of the election workers were given a memo containing specific instructions to help them prepare (Exhibit

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I-5). Each set was mailed to poll workers on the Friday before election, and were also included in packets which they received on school election day. According to Jarkesy, the judge of elections at School No. 6, where Theresa Bell and others were assigned as workers, told him everything was fine. However, he agreed he did receive calls from two persons during the latter part of the day indicating that more help was needed since many people had arrived to vote. Jarkesy thereupon went to the YWCA, where another polling district was located, and took one of the election workers from that site to School No. 6 to help out. While at the polling district Jarkesy did observe many people on line, although he did not see anyone complain about any improprieties. In particular, Theresa Bell made no such complaints to him. When he returned at about 8:30 p.m., Jarkesy saw no irregularities going on, no campaigning and no complaints. Finally, on cross-examination, Jarkesy noted that although two persons did sign up with his office to be challengers—Frias was not one of them.

On redirect examination by counsel for petitioner, Jarkesy repeated that the nature of the complaint received concerning School No. 6 was that there were many people in the voting area. He also agreed that Maldonado was never designated as an official poll worker.

In response to an inquiry from the undersigned, Jarkesy agreed that the proper procedure is for a voter to sign a poll list and that list should then be compared to the signature copy register. The instructions to poll workers did not indicate an obligation to make any comparison, either of a poll list or of a voter authority signature.

TESTIMONY FOR THE BOARD OF EDUCATION AND FOR INTERVENORS

Following the conclusion of the testimony offered on behalf of petitioner, the Board determined to rest its case. The intervenors then called one witness, Lillian Gold. She has worked at the polls in Passaic for about 12 years at School No. 3 (polling district no. 9), including school elections, primary and general elections. Gold said that while she was working at the polls on April 5, 1988, she saw all voters come in and sign their names,

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whereupon the signatures were checked against the signatures in the "big brown book." She would give voters a voter authority to sign after they signed the poll list.

Gold arrived at the polling district at about 8:45 a.m. to help set up for the election. There were four other workers with her that day, and all followed the proper procedure. She noted, however, that with regard to seven or eight voters whom she had known personally for a long time, she did not bother to compare their poll list signatures with their signature in the register books. However, she insisted they all signed the poll list and voter authorities.

With respect to the contention that she left the polling area with one of the signature copy registers, at about 8:15 p.m., Gold noted she did leave the building for a few minutes to bring a thermal bag which she had brought with her in the morning to her car. She produced the bag in court and described it as being approximately 8 inches by 10 inches, with a two-foot-long brown strap. Her purpose in bringing the bag to the polls was to carry some food and a thermos bottle. Gold categorically denied that she ever had an official book with her outside the building.

At 9 p.m. the voting machines were closed and Gold, herself, unlocked the machines and read off the count. Various people were there, including Gentile. Finally, Gold indicated that on one occasion she had to go into a voting booth since a young female voter had hit four levers at once and needed instructions as to how to rectify that problem. Gold gave her those instructions and left the booth.

DISCUSSION

At the request of the undersigned administrative law judge, counsel for petitioner listed the specific statutory provisions which he claimed were in issue in this case. In particular, they included N.J.S.A. 18A:14-46, 14-48 through 14-51.1, 14-57, 14-59, 14-63, 14-65, 14-67, 14-72, 14-73 and 14-81 through 14-86. Each will be discussed as appropriate.

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As can be seen from the testimony set forth above, there were various alleged irregularities which petitioner claims took place on school election day in Passaic on April 5, 1988, and which he insists either singly or in combination dictate that the result of the election must be set aside and either Gentile declared to be one of the three winners, or a new election called either within certain districts or on a school district-wide basis. Several of the irregularities were the same as those noted in the Commissioner's recount determination and they need not be repeated again. Suffice it to say they have already been set forth and that recount decision, itself, is attached as an Appendix.

The most serious irregularities claimed to have occurred involve the use, misuse or nonuse, as the case may be, of the composition books which served as the poll lists. In the first place, of course, as the Commissioner pertinently observed, the composition books themselves had certain omissions. For example, they did not indicate the polling district number or the number of the machine, and two separate books were used in most of the polling districts, divided alphabetically (A-K and L-Z). By signing alphabetically, the sequence of ballot numbers was disturbed. Further, a number of names were scratched out of one poll list book and rewritten in another. There is no dispute that this occurred.

Beyond that type of irregularity, petitioner maintains that grave malconduct occurred since, in many instances, the numbers of signatures in the poll list did not match either the number of voting authorities and/or the number of votes registered on the public counter on the voting machines. These irregularities, too, were noted by the Commissioner. Gentile also maintains that in some of the districts fraud clearly took place since there was no dispute that either the same person signed everyone's name in the poll list (Exhibits P-4, P-4A), or a few persons signed the names of a great number of other voters (Exhibits P-5, P-5A). Equally serious, according to Gentile, is the additional fact, not disputed, that little or no effort was made to compare signatures placed in the poll list with the signatures in the signature copy register.

While both the Board and the intervenors challenged the veracity of some of the testimony regarding the nonuse and/or misuse of poll lists, they candidly concede, as they must, that many irregularities did occur. However, they essentially argue that none of

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these irregularities, while not necessarily to be condoned, were meaningful since in no instance did a single voter take the stand to claim that he or she, legally entitled to cast a vote, was prevented from doing so. Nor, they point out, was any direct testimony presented that any person not legally entitled to vote, did so anyway. With regard to a failure to make signature comparisons between poll lists and signature registers, both the Board and intervenors point out that in every single district the numbers of signatures on the voting authority slips coincided exactly with the numbers registered on the public counter, and that absent evidence to the contrary it must be assumed that proper comparison was made of the signatures on the authorities to the signature copy registers.

The school election provisions pertinent to the use of poll lists and signature comparisons may be found in N.J.S.A. 18A:14-47 through 14-51.1.* Both Zeug and Jarkesy essentially agreed that proper procedure anticipates that the school laws faithfully will be followed and in that respect it is anticipated that on school election day a person entering the polling area seeking to vote in the school election shall, prior to voting, give his full name and address to the election officer in charge of the signature copy register and before receiving an official ballot shall sign his name without assistance and his address in an appropriate column of a poll list which is required to be maintained at each polling place. In addition to presenting oneself to vote and signing the poll list, the statutes go on to require that before an official ballot shall be given to a voter, one of the election officers shall compare the signature entered by the voter in the poll list with the signature in the signature copy register, and if the signature in the poll list is, "the same or sufficiently similar to the signature in the signature copy register, the voter shall be eligible to receive a ballot." N.J.S.A. 18A:14-51. The comparison of signatures and, where a voter alleges his inability to write, the comparison of answers made by the voter upon registration and upon election day, are to be carried out in full view of any challengers.

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*Interestingly, counsel for petitioner did not cite any violation of N.J.S.A. 18A:14-47, which deals with signature copy registers. However, that statute requires that these registers, "shall be used in the election," and some witnesses testified that this did not take place. See also, N.J.S.A. 18A:14-44(c).

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Since in some instances in the April 5, 1988 school election many, if not all, of these statutory requirements were ignored either in whole or in part, the threshhold question is whether those irregularities are, standing alone, sufficient to vitiate the election and, if so, to what extent. Counsel addressed themselves to several cases which touch upon the failure properly to maintain and/or use poll lists, including the issue of signature comparison. The leading decision in New Jersey is In re Clee, 119 N.J.L. 310 (Sup. Ct. 1938). In that case Clee, the losing candidate, filed a petition contesting the election of A. Harry Moore as Governor and raised a variety of allegations respecting voting fraud and other irregularities. One allegation was that members of the district election boards failed to compare the signatures entered in the poll books with the signatures in the signature copy registers in localities where there was permanent registration in order to ascertain if the signatures were the same or sufficiently similar.

In rejecting Clee's claim that the failure to make comparison was serious enough to vitiate the election, the court first noted that no evidence had been profferred that a single illegal vote actually was received. Nevertheless, the court went on to indicate that even if it is assumed that in not one of the approximately 222,000 instances was an effort made to compare signatures, the neglect constituted a failure to perform a directory duty and cannot invalidate the result of the election. In re Clee, supra, at 321. Chief Justice Brogan observed that it was a principle of universal application, "that an irregularity which does not deprive a legal voter of his vote [not accompanied with fraud by the party seeking the benefit thereof] will not vitiate the election. The omission by election officers to discharge some duty merely directory will not set aside the return." In re Clee, at 321-322, citing Burrough v. Branning (9 N.J.L.J. 110).

The Commissioner of Education, too, has had occasion to address issues involving poll list irregularities. Thus, in In the Matter of the Election Inquiry Held in the School District of Garfield, 1977 S.L.D. 771, a hearing officer observed that one of the complaints raised by the party challenging the election and seeking an inquiry consisted of an allegation, corroborated by an election worker, that she did not turn the poll list around to compare voters' signatures with the signature copy register, as required by N.J.S.A. 18A:14-51. The hearing officer noted that this and several other allegations

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which were proven to be true represented, "serious violations of the school election laws." However, he did not suggest that the election be set aside.

Following his review of the record, the Commissioner in Garfield agreed that lack of compliance with statutory requirements evidenced by the numerous irregularities which took place were to be deplored and could not be condoned. However, the Commissioner also observed that neither alone, nor in combination, did any of the irregularities (including the failure to compare signatures) warrant setting aside the election since it was the clear intent of the laws that elections are to be given effect whenever possible and irregularities and deviations from the election laws should not void an election where the will of the people has been fairly expressed. Thus, "it is only when deviations from statutory procedure are so gross as to produce illegal votes which would not have been cast or to defeat legal votes which would have been counted, so as to make impossible a determination of the will of the people, that an election will be set aside. In re Wene, 26 N.J. Super. 363 (Law Div. 1953) sets forth the rule as follows:

> The rule in our State is firmly established that if any irregularity or any other deviation from the election law by the election officials is to be adjudged to have the effect of invalidating a vote or an election, where the statute does not so expressly provide, there must be a connection between such irregularity and the result of the election; that is, the irregularity must be the producing cause of illegal votes which would not have been cast or of defeating legal votes which would have been counted, had the irregularity not taken place, and to an extent to challenge or change the result of the election; or it must be shown that the irregularity in some other way influenced the election so as to have repressed a full and free expression of the popular will. (26 N.J. Super. at 383) [Garfield at 776.]

A more recent Commissioner's decision also touches upon the same issue. See, In the Matter of the Annual School Election Held in the School District of Passaic, Morris Township, OAL DKT. EDU 3412-85 (Nov. 27, 1985), Comm'r's Decision (January 15, 1986). In that case a defeated candidate asked for an inquiry with respect to various alleged statutory violations, including omitting voters' addresses in poll lists. In addition, the administrative law judge herself raised an issue that had not been transmitted to the OAL

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by the Commissioner, but which emerged from the testimony concerning the method of registration; i.e., a failure to compare signatures in the poll list with the permanent signatures of the voters. In respect to that issue, Judge Moses observed that it was undisputed that the person handling the poll list at one of the polling places did not even have a signature copy register at hand. Nevertheless, she went on to note that, "yet there is no testimony before me that any ineligible voter was allowed to vote as a result of a failure of one of the workers to compare signatures. Since there is no testimony that ineligible voters were allowed to vote, any irregularity resulting from a lack of comparison would not, and did not, affect the outcome of the election, the watershed test, and therefore the election will not be set aside based on this irregularity." In the Matter of the Annual School Election Held in the School District of Passaic Township, supra, Initial Decision at 11. Judge Moses went on to observe that, "any irregularity or deviation from the election law must be connected to the result of the election and must be the cause of illegal votes which would not have been cast and which have defeated legal votes. Otherwise, the election should not be voided because to do so would repress the free will of the people." Passaic Township, at 14 (emphasis added).

In his review of Judge Moses's decision, the Commissioner discussed the failure of the school election officials to require that both names and addresses be placed in the poll list at the time the right to vote is claimed and determined that even though the statute prescribed that a voter shall state his address, this had to be construed to mean that the address be stated in writing. Other than that modification, the Commissioner affirmed Judge Moses's decision, including, of course, her determination that the admitted failure to compare signatures should not be relied upon to void the election.

As noted in both the Garfield and Passaic Township cases, and as appears in a myriad of election cases decided both by the courts and by the Commissioner, while statutory requirements concerning elections are expected to be followed, and deviations can cause serious consequences, every effort normally is made to attempt to uphold the result of the election, absent clear proof of fraud or other pervasive malconduct that can be tied directly to the outcome. See, e.g., IMO The Elec. Inquiry in Fair Lawn, 1977 S.L.D. 1156-1161 (Oct. 27, 1977). Indeed, the very statute under which the present inquiry

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had been made literally prescribes that the purpose of an inquiry into alleged violations of statutorily procedures essentially is to determine not only whether such violations occurred but, if they did, whether they actually, "affected the outcome of the election." N.J.S.A. 18A:14-63.12. In this respect, the irregularities pertaining to failure to include addresses in poll lists, failure to maintain poll lists at all, failure to maintain them according to ballot issuance rather than alphabetically, and all of the other allegations pertaining to the poll lists in this case do not, in my opinion, rise to a level sufficient for me to direct that the school election held in the City of Passaic on April 5, 1988, be set aside or that the certified results of the recount be modified.

The essential basis for my determination is not merely that there is case law which holds that deviations are to be construed as minor irregularities, unless it is shown that voters qualified to vote were barred from doing do, or that unqualified voters were permitted to vote, thereby casting in doubt the election results. I believe that a wholesale failure to compare signatures, despite the language of Clee, Garfield and Passaic, could in some cases rise to a level sufficient to set aside an election since comparison of signatures, it seems to me, is at the very heart of the electoral process. Unless election officials can maintain the public's expected confidence that only those persons entitled to vote actually do so, the very integrity of the electoral process could totally be undermined. Thus, in this case, were it not for the fact that voters signed voter authorities, and that the number of such slips coincided exactly with the public counter on the machines, a different result might obtain. However, in view of that exact matching, and absent direct proof of an actual illegality, and bearing in mind that it was the burden of petitioner to prove his allegations by a preponderance of the credible evidence, although wholesale "forgery" technically took place vis-a-vis the poll lists, there was, nevertheless, substantial compliance with the signature comparison obligation.

One possible "chink" in the foregoing conclusion has to do with the "Pablo Febres" incident since it appeared that Febres's "signature" is to be found in three separate places and each appears to be different. Thus, according to Schaffenberger, the Febres signature in the signature copy register maintained at the County Board of Elections was designated by an "X." Yet, the voter authority slip which has his printed name also contains Febres's

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signature (Exhibit P-7). Moreover, my own comparison of the Febres signature contained in the poll list (Exhibit P-5) with the signature on Exhibit P-7, indicates that they may not have been made by the same hand either. Clearly, the "F" in the name "Febres" is totally different, as is the "s" at the end of the surname. Indeed, it would appear to me that the signatures of both Pablo Febres and Adriana Febres appearing in the poll list were entered by the same person, as were their addresses. So too, the signature of Adriana Febres appearing on the voter authority for ballot no. 012 (Exhibit I-3D) does not appear to match her signature in the poll list either.

Thus, according to petitioner, with respect to the Pablo Febres vote, a conclusion that the person who signed the voter authority as Pablo Febres, and presumably voted, was actually the registered voter, is destroyed. The Board and intervenors take the view that the burden rests upon the petitioner to destroy that confidence, and he could easily have clarified any confusion by subpoenaing Febres to testify. I agree. I also agree that it theoretically is conceivable (although unlikely) that the person who signed the voter authority as "Pablo Febres" could have been the same person who signed the "X" in the signature copy register. On balance, then, although this incident sadly is symptomatic of the deviations which took place during the course of the subject school election at many of the polling districts, petitioner has failed to meet the "watershed test" articulated by Administrative Law Judge, now Superior Court Judge, Moses—solid proof that one not entitled to vote actually did. Mere suspicion, without more, is not enough.

In view of my determination that the irregularities attendant upon the poll list use and misuse did not impact upon the outcome of the election, there is no need to embark upon the mathematical calculations which petitioner asked me to undertake with regard to subtracting from various totals, in various districts, that number of names which were "proven" to have been improperly or inadequately listed. Absent proof of actual fraud, and absent live testimony from even one person establishing the same, I repeat that given the established principles with respect to postelection analyses of irregularities, none of these statutory violations rose to a level sufficient to interdict the expression by the voters of Passaic of their will in regard to what I have designated as the "poll list issues."

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Another series of statutes implicated by the allegations include those touching upon the prohibition against campaigning and/or electioneering in or about the polling area. See, N.J.S.A. 18A:14-46, 14-65, 14-67, 14-72, 14-73, 14-81, 14-85, 14-86. With respect to these, and perhaps other election statutes, an essential claim is that a gentleman identified as Ozzie Maldonado, if not other persons as well, were engaged in a process of both importuning voters to vote for certain people and, moreover, showing them names and/or giving them the numbers of the levers to pull.

There was enough testimony offered, even from witnesses who by virtue of blood relation or otherwise were supporting unsuccessful candidates, to convince me that conduct was taking place which, at the very least, arguably appears at times to have crossed the line and amounted to improper electioneering. However, counsel for Gentile was unable to provide me with any decision whereby such conduct was found sufficient by the Commissioner to set aside the results of an election, and I have not found any either. There is no question but that steps were not taken adequately to protect against the sort of activities which some of the witnesses claimed they observed. For this state of affairs the election officers and the Board must carry the blame. With respect to these sorts of incidents, not to mention the statutory deviations previously described, efforts must be taken to make sure that repetitions do not take place.* A formalized education process must be put in place under the direction of the Board, with the assistance of the Passaic County Superintendent of Schools, in order to assure that the requirements of N.J.S.A. 18A:14-6.1 are faithfully met; specifically, that proper instruction be given to election officers with regard to their duties and that no one shall serve as an election officer in any election at which a voting machine is used unless he or she has received instruction and is fully qualified to perform the duties.

Several other statutes were cited by petitioner in his prehearing memorandum which involved conduct described in the testimony in this case. See, e.g., N.J.S.A. 18A:14-46

*Indeed, this is the second successive school election inquiry in this school district which revealed voting irregularities. See, IMO The Annual School Election Held in the School District of the City of Passaic, Passaic County, OAL DKT. EDU 2593-87, Comm'r's Decision (June 8, 1987).

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(requiring persons not needed to be there to leave the polling place); N.J.S.A. 18:14-57 (election officers only should count votes); N.J.S.A. 18A:14-59 (the judge of election shall announce the result); N.J.S.A. 18A:14-63 (boards of education shall have the duty to assure proper conduct of a school election); N.J.S.A. 18A:14-67 (election officials shall properly perform and enforce all provisions of the school election laws); N.J.S.A. 18A:14-73 (no person shall mark or show his or her ballot or solicit votes or prompt a voter); N.J.S.A. 18A:14-82 (poll list shall not be removed, destroyed or mutilated); and N.J.S.A. 18A:14-86 (soliciting illegal registration or illegal voting). In addition, although not cited by counsel, certain provisions of the General Election Law (Title 19) also were implicated by the testimony. For example, both N.J.S.A. 19:31A-8 and 19:50-3 specifically address the process for assisting voters who establish to the satisfaction of the election officials that by reason of an inability to read or write, blindness or other physical disability, he or she is unable to cast his vote without assistance. So too, N.J.S.A. 19:52-7, which requires that all keys for voting machines should be kept securely by proper officials and that a violation can constitute a misdemeanor. See, N.J.S.A. 19:53-1.

With respect to offering assistance to those in need, there was testimony that on different occasions voters were accompanied by others into the machine voting booths. In each instance it appeared as if no adequate steps were taken by the election workers to be sure that the person to whom assistance was given asked for it properly, and/or demonstrated a need. However, none of these statutory violations (and others) either alone or in combination, were sufficient to vitiate the election. See, e.g., IMO Annual School Election in the School District of the Township of Willingboro, OAL DKT. EDU 2588-87 (April 22, 1987), Comm'r's Decision (June 2, 1987) at 6; IMO Annual School Election, Matawan-Aberdeen School District, OAL DKT. EDU 2590-87 (Sept. 8, 1987), Comm'r's Decision (October 20, 1987) at 28.

The final serious irregularity addressed during the course of the testimony had to do with the claim that Lillian Gold departed from one of the polling districts with a signature copy register under her arm prior to closing of the polls. See, N.J.S.A. 18A:14-82. Having heard and considered her testimony, as well as that of Mickolajczyk who made the allegation, I am convinced that no such statutory violation took place and, in point of

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fact, Gold actually was bringing personal property to her car. I believe Mickolajczyk honestly mistook the thermal bag for a signature copy register.

One final observation ought to be made in view of the fact that counsel for petitioner specifically directed my attention to it during the course of oral argument. In the Commissioner's recount decision in this case one of the irregularities involving the poll list had to do with an observation made by the Commissioner's representative that in district no. 14, in which all 84 of the names appeared to have been printed by the same person, this was done by an election worker and, moreover, that since the signatures were in the bound voting authority pad, they could have been used for comparison purposes with the signature registers. With respect to these observations, I tend to agree with counsel that insofar as my hearing was concerned, there was no evidence as to who actually printed the names in the poll list (Exhibits P-4, P-4A). It may or may not have been an election worker. On the other hand, it seems to me that there still is no substantial significance insofar as the outcome of the election is concerned. With respect to the implication contained in the finding by the Commissioner that the signatures on the voting authorities were those of the voters, and could have been used for comparison purposes, I agree with that finding. The burden of proof to demonstrate, to the contrary, that no comparison of any sort was made, was upon the petitioner, not the Board or the intervenors. No evidence was produced tending to show that the signatures on the voting authorities were not those of the voters themselves, or that a comparison of the signatures had not been made. While it is true that some of the witnesses did not happen to see any comparisons being made, this does not mean that none were accomplished. Again, the exact matching of the number of voting authority slips on the string to the public counter number in every challenged district is an adequate basis for me confidently to conclude that, absent direct proof to the contrary, the persons who cast their votes were found to be eligible voters.

In addition to citing various statutes which allegedly were contravened (and many were), counsel for Gentile also relied upon the decision in In re Bonsanto's Application, 171 N.J. Super. 356 (App. Div. 1979). In that case the court observed that where election irregularities are such that one cannot "with reasonable certainty" determine who has

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received a majority of the legal votes, the election should be set aside. All sides agree with that salutary proposition. However, in this case, although irregularities were proven, there was no showing that because they occurred, a determination of who received the majority of the legal votes could not be ascertained with the "reasonable certainty" the law requires.

Perhaps one of the best examples of an articulation of the legal principle which ought to be applied in matters of this sort, insofar as the duty of a hearing tribunal is concerned, can be found in the decision by Judge Jayne in Sharrock v. Keansburg, 15 N.J. Super. 11 (App. Div. 1951). In that election case Judge Jayne stated that the following guideline should be followed in election challenge cases where there was no statutorily specified irregularity requiring that an election be nullified:

> But where, as here, there is no such legislative declaration, the courts consider the nature of the irregularity, its materiality, the significance of its influence and consequential derivations in order to determine whether the digression or deviation from the prescribed statutory requisitions had in reasonable probability so imposing and so vital an influence on the election proceedings as to have repressed or contravened a full and free expression of the popular will, and thus deduce the legislative intent reasonably to be implied. Sharrock, at 17.

Having considered literally dozens of election decisions issued by the courts and by the Commissioner, I do not believe any clearer expression of the pertinent factors are to be found. As Judge Jayne then went on to note in Sharrock:

> The right of suffrage in a government of and by a free people must always be regarded with jealous solicitude. To overthrow the expressed will of a large number of voters for no fault of their own and solely because of some harmless irregularity would in many cases defeat the paramount object of the election laws. . . .

Sharrock, at 18.

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Finally, I believe that the following language, as well, from the decision by Judge (later Justice) Schettino in In re Smock, 5 N.J. Super. 495 (Law Div. 1949) also is an appropriate statement of the principles particularly applicable in this case:

> Elections are public events of ultimate importance. The expression of popular will thus evidenced should be sustained unless compelling circumstances impugn the correctness of the result.
>
> Obviously not every infraction of the election laws will invalidate the contest. There is a settled distinction between violations of directory, as distinguished from mandatory, provisions of the law. As here used the characterization of a provision as "directory" is not intended to suggest that compliance therewith is discretionary with the officer concerned, but rather to indicate that the Legislature did not intend that a violation thereof shall invalidate the election. Officials charged with enforcing election laws are bound to comply with the provisions, whether directory or mandatory in nature, and for their infraction are amenable in accordance with law. And their timely compliance with directory provisions may be judicially compelled. But the election will not be upset where the provision violated is directory in quality. In re Clee, 119 N.J.L. 310, 196 A. 476 (Sup. Ct. 1938); 29 C.J.S., "Elections," §214, p. 307. R. S. 19:29-1, in setting forth the grounds of contest, nowhere sugests that every violation of the election law will suffice. 5 N.J. Super. at 501.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Accordingly, in light of my consideration of the testimony and documentary evidence offered in this case, I make the following Findings of Fact and reach the following Conclusions of Law:

1. On April 5, 1988, the annual school election was conducted in the School District of the City of Passaic, Passaic County, with respect to balloting for the selection of three members of the Passaic Board of Education for full terms of three years each.

2. As a result of that balloting, and following a recount conducted on April 13, 1988, under the supervision of a representative of the Commissioner of Education, the final tally of the votes was as follows: Mary L. Guzman

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obtained 1,384 votes, Manuel Fuentes obtained 1,360 votes, Pedro P. Cancel, Jr. obtained 1,280 votes, Andrew L. Gentile, Jr. obtained 1,279 votes, Louis Salerno obtained 1,206 votes, Charlie Allen obtained 1,161 votes and Andrew Conklin obtained 818 votes. As a result, the Commissioner's representative certified that Guzman, Fuentes and Cancel had been elected.

3. However, as a result of the recount, a number of procedural irregularities which took place in connection with the conduct of that school election were determined to have occurred. Those irregularities were set forth by the Commissioner in his decision in the case of In the Matter of the Annual School Election Held in the School District of the City of Passaic, Passaic County, #72-4/88 (April 27, 1988). In lieu of repeating the same, reference hereby is made to the entire decision which is contained in Appendix A to this initial decision, and the specific irregularities noted at pp. 3, 4 and 5 of that decision are expressly incorporated herein as if fully set forth.

4. Contrary to various provisions of the school election laws pertaining to maintenance of poll lists and comparison of signatures entered by voters in poll lists to those contained in signature copy registers in various polling districts used during the course of the Passaic school election on April 5, 1988, many voters did not sign any poll lists and others signed their names in the poll list but addresses either were not included or were not fully set forth.

5. Some voters at the school election also were permitted to vote without any effort having been made to be sure that the signature they placed either in the poll list or on the voter authority matched their signatures in the signature copy register. However, every voter who so testified was a duly registered voter eligible to vote at the school election, and did cast a vote.

6. During the course of the school election and during the hours that the polls were open at some of the polling districts, a person or persons engaged in conduct which was tantamount to electioneering. Such conducted consisted, inter alia, of calling out numbers of ballot positions (one, three and four) to voters as they entered the polling area, or when they were in the booths, and/or pointing to names of candidates appearing on printed materials.

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7. Further during the course of the school election, incidents occurred from time to time wherein more than one person at a time entered the voting booth together. On those occasions, no prior demonstration of the need for assistance by the voter was shown.

8. At one polling district a key to a voting machine was in the possession of a school custodian, not a person authorized by law to have custody of the key.

9. At some of the polling districts large numbers of people came to vote at the same time thereby causing crowded and, at times, chaotic conditions which interferred with the ability of poll workers to maintain perfect order and discipline at the polling areas.

10. On the Friday prior to the Tuesday school election the Board Secretary/Business Administrator sent a three-page instruction sheet to the election workers containing various instructions with respect to the conduct of the elections. The instructions contained on that document were not always followed by the election workers. For example, each voter was expected to sign a poll list, but did not. In addition, nowhere in the instructions was any indication given to election workers to compare the voter's signature in the poll list with the signature copy registers before permitting the person to vote. Furthermore, the instructions failed to offer advice with respect to safeguarding against electioneering, campaigning or other such unauthorized activity in or near the voting machines and polling booths.

11. Despite the foregoing irregularities, no person voted at the school election whose eligibility to vote was determined to be lacking and no person eligible to vote at the school election was prevented from voting.

Although the foregoing findings of fact include determinations reflecting the existence of a variety of irregularities and deviations from statutory requirements pertaining to the conduct of school elections, the failure by petitioner successfully to carry the burden placed upon him to demonstrate that any one or more of these

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irregularities affected the outcome of the election (see, e.g., Wene v. Meyner, 13 N.J. 185, 197-198 (1953); In re Application of Moffat, 142 N.J. Super. 217 (App. Div. 1976)) leads inexorably to the conclusion that regrettable as the variations which were proven to have occurred may be, they do not require that this election be voided. The "concrete," "solid" evidence required to be produced by a petitioner to justify such relief was not produced.

Finally, I again note that petitioner argues that even though one or more of the defalcations may not, standing alone, justify the relief sought, the totality of the circumstances reveals that action must be taken by the Commissioner to change the result of this election. For the reasons previously expressed, and on the basis of the cases already cited, this argument, too, must be rejected. Disgraceful as some of the errors were, neither singly nor in combination did they meaningfully effect the outcome of the election in such a way that it can be determined with reasonable certainty that the will of the electorate was thwarted. Thus, the results of this school election must, under the cases, be upheld.*

---

*The attention of the Board is directed to the following language contained in a foreward to the School Election Manual (1978) published by the N.J. Department of Education:

> School elections are an important phase of the total operation of the educational program. It is through such elections that citizens have the opportunity to express themselves regarding the nature and extent of the educational program which they desire for their children.
>
> It is then incumbent upon those who are officially responsible for the operation of school sytems to conduct school elections as provided under the statutes. Citizens have the right to expect their elections are conducted in a proper manner. It is with this in mind that the following material is prepared to guide school officials in planning and conducting such elections. School districts have access to advice and assistance through their board attorneys and County Superintendent of Schools, who are the representatives of the Commissioner of Education.
>
> The opportunity and right to express ourselves through a secret ballot is one of our most cherished possessions. Strict adherence to the election laws as well as meticulous planning and conduct will insure fine public relations as well as guarantee that all citizens' rights are being observed.

School Election Manual, N.J. Dept. of Education, 1978, p. iii. (emphasis supplied).

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Accordingly, after having considered the allegations of the petitioner, Andrew L. Gentile, Jr., I **CONCLUDE** that pursuant to N.J.S.A. 18A:14-63.1 et seq. and N.J.A.C. 6:24-6.1 et seq. he has not established by a preponderance of the credible evidence that the outcome of the school election was meaningfully impacted by any irregularities found. Therefore, the results of the school election held in the City of Passaic on April 5, 1988, as confirmed by the Commissioner in his recount decision dated April 27, 1988, shall not be disturbed. Thus, the three candidates with the highest number of votes, Mary L. Guzman, Manuel Fuentes and Pedro P. Cancel, Jr., all of whom have previously been sworn as members of the Passaic Board of Education, may continue to serve for the balance of their terms and it is hereby **ORDERED** that the petition of Andrew L. Gentile, Jr. for an inquiry pursuant to N.J.S.A. 18A:14-63.12 and N.J.A.C. 6:24-6.1 shall be **DISMISSED.**

It is further **ORDERED** that in light of the numbers and nature of the irregularities which took place at the school election, the Board of Education of the City of Passaic shall be required to plan and conduct comprehensive training sessions for all election board officers who will be engaged at the next school election. Such training shall include instruction with respect to all aspects of the proper conduct of such elections. Consideration also should be given to the possibility that security personnel may be required to be on call to assist in such elections and contingency plans for that event should be put in place.

It is **FURTHER ORDERED** that in view of the testimony of several witneses pertaining to conduct proscribed by N.J.S.A. 18A:14-72, 14-73, 14-81 and 14-85 with respect to electioneering activities, a copy of the final agency decision be made available to the office of the Passaic County Prosecutor for such action as that office deems appropriate.

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This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **SAUL COOPERMAN** for consideration.

May 17, 1988
DATE

Stephen G. Weiss
STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

MAY 13 1988
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

MAY 19 1988
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

amr/e

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IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
PASSAIC, PASSAIC COUNTY.	:	
	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law.

It is observed that no timely exceptions to the initial decision have been filed by the parties with the Commissioner pursuant to the applicable provisions of N.J.A.C. 1:1-18.4..

The Commissioner adopts as his own the findings and conclusions set forth in the initial decision.

In arriving at the above determination, however, the Commissioner cannot ignore those findings in the initial decision which clearly reveal that the Board, through its secretary and the school election workers, must assume the responsibility for the violations of school election procedures which did, in fact, occur at the affected polling places identified in the initial decision. The Commissioner especially cannot ignore those violations which permitted voters to vote without signing the respective poll lists; the failure to require certain voters to demonstrate the need for assistance before entering the voting machine booth with another person or school election worker; and, finally, the failure to remove the person identified herein who was electioneering at certain of the affected polling places.

It is clear from a reading of the pertinent sections of the school election laws that there are certain prohibitions with regard to the failure of officers or employees of the Board to perform or enforce the provisions of the laws pertaining to school elections. Similarly, there is a prohibition in school law with regard to electioneering.

The specific language set forth in the school election laws reads as follows:

> 18A:14-67. Failure to perform, or enforce provisions of title, a misdemeanor
>
> Any officer or employee of any board of education or any person designated as an election officer to hold any election who shall willfully fail to

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perform or enforce any provision of this title, or shall willfully destroy any record directed to be kept thereby, or any person who shall willfully or fraudulently register to vote in any election or elections more than once, or register under any but his true name, or attempts to vote in any election by impersonating another, who is registered, or, being registered in an election district in which he is not a resident at the time of registering, votes or attempts to vote in any election, shall be guilty of a misdemeanor.

18A:14-81. Prohibits certain electioneering; penalty

If a person shall distribute or display any circular or printed matter or offer any suggestion or solicit any support for any candidate, party or public question, to be voted upon at any election, within the polling place or room or within a distance of 100 feet of the outside entrance to such polling place or room, he shall be a disorderly person.

18A:14-72. Obstructing elections, electioneering near polling place prohibited

If a person shall on any day fixed for any election tamper, deface or interfere with any polling booth or obstruct the entrance to any polling place, or obstruct or interfere with any voter, or loiter, or do any electioneering within any polling place or within 100 feet thereof, he shall be a disorderly person and shall be punished by a fine not exceeding $500.00 or by imprisonment not exceeding one year, or both.

Given the fact that certain of these statutorily proscribed irregularities did occur at the annual school election held in the School District of the City of Passaic on April 5, 1988, the Commissioner finds such irregularities sufficiently flagrant to cause him to transmit a copy of this decision to the Office of the Passaic County Prosecutor for the purpose of taking any further action deemed appropriate and consistent with law.

In all other respects, however, the instant petition of Andrew L. Gentile, Jr., is dismissed and the Board is hereby ordered to comply with all of those directives set forth in the initial decision, ante.

COMMISSIONER OF EDUCATION

July 1, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5589-87
AGENCY DKT. NO. 241-7/87

ROBERT J. PALADINO,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF LACEY,
Respondent.

Russell J. Schumacher, Esq., for petitioner

Arthur Stein, Esq., Board Attorney, for respondent (Curry, Stein & Bennardo, attorneys)

Record Closed: April 4, 1988 Decided: May 16, 1988

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

Robert J. Paladino, petitioner, alleges and the Lacey Township Board of Education (Board), respondent, denies that the Board improperly terminated his employment as superintendent of schools and caused him to revert to the position of elementary school principal.

PROCEDURAL HISTORY

The petitioner opened this matter before the Commissioner of Education on July 28, 1987, by filing a verified petition of appeal. The Board filed its answer on August 17, 1987. The Department of Education transmitted the matter to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq., on August 19, 1987.

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After notice, a prehearing conference was held on October 6, 1987. Among other things, it was determined that the issue to be resolved is whether the Board's action was proper and, if not, to what relief the petitioner is entitled. The matter was heard on February 1, 2 and 3, and April 4, 1988. On that date, the Board moved to dismiss the petition.

FACTUAL BACKGROUND

Certain facts are not in dispute or are demonstrated clearly in the record.

The Lacey Township Board of Education spent considerable time and effort in the 1986-87 school year conducting a search for a superintendent of schools. The Board hoped to complete the search by late February or early March 1987. With the help of a consultant, the Board narrowed the field to 10 applicants and, ultimately, to three applicants. These applicants were referred to as the finalists. Although a committee of the Board did the preliminary work, when the number of candidates was reduced to 10, the whole Board became involved.

On March 2, 1987, the Board met and reviewed the 10 candidates selected by the committee. The Board reviewed the information concerning each candidate and each Board member said yes or no to each name on the list. Five persons received yes votes. The petitioner received no affirmative votes. Based on the votes cast, the Board selected the three finalists, a group that did not include the petitioner.

The Board next arranged further interviews with each of the three finalists beginning on March 13. At some time before March 13, the Board learned that two candidates had asked that they no longer be considered. It was later discovered that they had received anonymous letters, newspaper clippings and, in at least one instance, a telephone call concerned with problems in the district.

Two committee members contacted one of the withdrawing finalists. The candidate indicated he was not interested in the position until after the Board election. The one finalist who did not withdraw her name could not assume the position until July 1. A Board member testified that she and some other Board members feared a new Board "could come on" and destroy the employment contract if it did not become effective until July 1.

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Another Board member, in addition to giving substantially the same testimony as the first, added the following facts. He served as chairman of the search committee. After the events outlined above, he believed the one finalist who had not withdrawn her name was the obvious candidate. Although she had received considerable support in the Board's sifting process, when she became the only candidate some of that support evaporated. The Board discussed all 10 semifinalists. This witness volunteered to contact the two finalists who had withdrawn. The Board directed him also to contact three other semifinalists including the petitioner.

The two finalists who had withdrawn refused to accept reconsideration. Another semifinalist would not return the witness' telephone call. The witness called the petitioner. He arranged to meet the petitioner and another Board member on the petitioner's boat on the following Sunday. At the meeting, the men discussed the petitioner's goals for the district, salary requirements and other requirements. The petitioner had prepared a "negotiation sheet" (R-31). These matters were discussed at the Sunday meeting but finalized only after the petitioner was hired.

At the March 23 meeting of the Board, the witness reported his contacts with the various finalists and semifinalists. After a longer discussion in private session, the Board took a straw poll. The Board then went into public session and voted to hire the petitioner.

The witness spoke to the then Board attorney twice. Prior to appointment of the petitioner, the witness had the attorney draw up a superintendent's employment contract in blank for Board review. After the Board appointed the petitioner, this witness gave the attorney dollar amounts and other terms to be used to fill out the contract. The actual contract (R-25) was signed on April 6, 1987, the day before Board elections were held. The last paragraph on page one reads, "In the absence of any provision herein for a definite number of days' notice to terminate this contract it shall run for the full term named above." The term referred to was March 24, 1987 - June 30, 1990. The document also lays out the superintendent's salary for each year within the term of the contract. The petitioner had requested the absence of any provision for a definite number of days' notice to terminate the contract.

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The Board discussed the contract at private session prior to approving it. It seems clear that there was some controversy surrounding the contract. When Board members questioned this witness specifically as to whether the contract conferred tenure, the witness replied in the negative and said the petitioner still could be removed for cause — for example, poor evaluations. It was his intent to give a "secure, sincere contract" and to give the petitioner time to work on the district's problems. The witness believed that if the petitioner did not receive favorable evaluations, he could be removed.

Other testimony adduced went to the petitioner's experience in some areas and lack of experience in others.

The petitioner's testimony shows that one week after reorganization of the Board, a recently elected Board member with previous membership experience discussed the petitioner's resignation with him. They had three conversations in the space of approximately one week. Other Board members were present for at least two of the conversations. On the Monday following these conversations, the petitioner called the Board member and stated that he would not resign as superintendent. The Board member replied that the petitioner was in over his head and not qualified for the position. He stressed the petitioner's lack of experience with secondary education.

On April 29, at a special meeting of the Board, the petitioner was transferred back to his elementary principalship by a 4-3 vote (R-15). He requested a statement of reasons (R-28). He received an answer from the Board attorney dated May 29 (R-29). The pertinent parts of the letter state:

> Since you were present during the discussion that took place at the Board's meeting of April 29, 1987, you had the opportunity to hear the discussion from members of the Board. However, since you have requested a formal written statement, please be advised that the Board action was based generally upon your lack of experience and background to hold the position of Superintendent at this time.
>
> As you know, a Superintendent of Schools is responsible for numerous duties including, but not limited to supervision of instruction; advising principals and teachers in procedures, methods and materials of instruction; discipline and conduct of the schools in the district; educational and administrative leadership, supervision and guidance; recommendation of text

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books as well as reference and library books, materials of instruction, instructional equipment and school supplies.

As you know, the Lacey Township School district includes not only the elementary grades of K through 6, but the Middle School grades of 7 and 8 and the High School grades of 9 through 12. The position, therefore, also requires a broad background in all phases of curriculum; a broad background in how, when and why to supervise administrators; a background in budgetary matters; a background in staff negotiations; a background in construction of school facilities and a broad background in central office experience.

According to information received by the Board, your background consists of service as an elementary school teacher in this District from September 1, 1969 to August 1, 1973, service in another district for one year either in a teaching or low level supervisory capacity and then re-employment in the Lacey Township School District form August 1, 1974 until the middle of March, 1987 as Principal of the Forked River Elementary School. It appears that your central office experience is limited to the approximate six weeks that you spent as Superintendent of Schools. The Board, therefore, concluded that your background is essentially limited to the K through 6 level and does not consist of any broad base of curriculum experience, administrator supervision, budget preparation, staff negotiation, building construction and/or central office experience.

The Board was satisfied that you did not accordingly have the experience necessary to lead this District at this time. The Board concluded that your lack of experience would inhibit your ability to act independently, forthrightly and accurately in the position of Superintendent.

The foregoing is intended to be a statement of the non-legal basis for the Board's action. That is to say, it does not include any statement of the board's opinion as to the legality of the purported contract entered into with you by a previous Board.

It is hoped that the foregoing is of assistance to you in fully understanding the Board's action.

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DISCUSSION AND DETERMINATION

The testimony establishes the petitioner believed and the Board intended that the successor Board could not break the petitioner's employment contract. N.J.S.A. 18A:17-15 provides, in pertinent part:

> The board of education of a type I district and of any type II district, now having a superintendent of schools, may appoint, for a term not exceeding five years, a superintendent of schools by the recorded roll call majority vote of the full membership of the board.

N.J.S.A. 18A:28-6 provides:

> Any . . . teaching staff member under tenure . . . under this chapter, who is transferred or promoted with his consent to another position covered by this chapter on or after July 1, 1962, shall not obtain tenure in the new position until after:
>
> (a) the expiration of a period of employment of two consecutive calendar years in the new position unless a shorter period is fixed by the employing Board for such purpose; or
>
> (b) employment for two academic years in the new position together with employment in the new position at the beginning of the next succeeding academic year; or
>
> (c) employment in the new position within a period of any three consecutive academic years, for the equivalent of more than two academic years; . . . .

In Thomas v. Bd. of Ed. of Morris Tp., 89 N.J. Super. 327 (App. Div. 1965), the board had hired Thomas as superintendent of schools and entered into a two-year employment contract with him. The contract did not give Thomas tenure and the entire contract term was, in effect, a probationary period. Some 20 months later, a majority bloc of five members adopted a resolution canceling the two-year contract. Thomas was given a three-year contract from that date without any termination provision. The effect was to instantly clothe Thomas with tenure.

A few months later, a new majority was elected to the Board. The new Board unanimously adopted a resolution which, after reviewing the circumstances surrounding

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the issuance of the three-year contract, declared that contract to be against public policy, invalid and of no force and effect. The resolution also recognized the original two-year contract as the only valid and subsisting contract. Three months later, the Board unanimously adopted a resolution exercising the 90-day termination clause contained in the original two-year contract and terminated Thomas's employment.

On appeal, the Commissioner upheld the Board's position that the three-year contract was invalid. A further appeal was taken to the State Board of Education, but the State Board affirmed the Commissioner's decision, holding that under the circumstances the action of the Board was shown to be an abusive discretion, arbitrary and contrary to public policy.

The Appellate Division noted that the hiring Board, after careful consideration, was unwilling to enter into an employment contract with Thomas that would give him tenure. "Undoubtedly, the board wanted to reserve to itself the right to consider Dr. Thomas' actual performance as superintendent of schools during the probationary period before committing itselt to a tenure appointment." Id. at 332-333.

The court also observed that the manner in which the three-year contract was effected "suggests that the real reason for the October 18, 1961 resolution was that the members of the majority bloc, mindful of the coming election, decided to give Dr. Thomas tenure while they could, even though it meant shortening his probationary period by almost two-thirds." Id. at 333-334.

Among other things, the court also noted that the change was effected by a majority of five members, three of whom were serving terms that would expire within a few months. The matter was privately discussed and planned in advance, but notice of it was withheld from the public.

The most instructive language of the court is:

> The controversy here concerns the legality of the tenure employment of a superintendent of schools. This is one of the most vital and responsible duties that a board of education can perform. Cullum v. Board of Education of North Bergen Township, supra, 15 N.J. [285 (1954)] at p. 292. The original selection of Dr. Thomas in December 1960 indicates that the

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> Board recognized the importance of its action and acted accordingly. On the other hand, the October 18, 1961 episode, no matter how well intentioned, inasmuch as it involved a change in Board policy in such a vital matter, lacked the essential elements of notice, deliberation and fair opportunity to be heard. In short, the action was not taken in good faith. [Id. at 334.]

So it is in the present case. As was established in Cullum, above, actions of a board of education which might otherwise be legal may be set aside if there were evidences of bad faith or "a lack of exercise of discretion and an arbitrary determination" as would warrant such action. 15 N.J. at 292.

In the Commissioner of Education decision in Thomas, 1963 S.L.D. 106, the Commissioner relied heavily on Cullum. The Commissioner noted:

> In setting the resolution [naming Cullum superintendent] aside, the Supreme Court said:
>
> > "***there still remains for determination the controlling legal issue as to whether the manner in which the Board majority exercised the power of appointing a superintendent constituted official action which was taken arbitrarily or in bad faith and should, therefore, be set aside under the wholesome principles recently restated by this court in Grogan v. DeSapio, 11 N.J. 308, 325 (1953).***
> >
> > The members of the respondent Board of Education hold positions of public trust and must at all times faithfully discharge their functions with the public interest as their polestar. (Ibid., 292)
>
> The Court continues, at page 293:
>
> > "***When the 8 o'clock meeting was called to order, the resolution appointing Mr. Cullum was immediately presented as a fait accompli. Although the meeting was called to consider the appointment of a superintendent, there were no deliberations whatever and the public had no timely opportunity to be heard on the matter. . . .
> >
> > > "***The open meeting they held was nothing more than a sham and as Judge Hartshorne suggested in Grogan v. Desapio, 15 N.J. Super. 604, 611 (Law Div. 1951), it ought to be dealt with 'as if it had never occurred.'"

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R-13 in this matter, minutes of the special Board meeting of May 23, 1987, show a motion to appoint Robert Paladino as superintendent effective March 24, 1987. There is no record of any discussion, before or after the motion, concerning the appointment. It appears a roll call vote was taken and the motion carried, 4-3. Inasmuch as the entire meeting lasted 22 minutes and much of that time was given to budget considerations, I cannot even infer that there was any discussion of the most vital function the Board of Education performs.

I **FIND** the present matter on all fours with Cullum, above, and Thomas, above. In stark contrast with Rall v. Board of Education of the City of Bayonne, 54 N.J. 373 (1969), I **FIND** that the original action of the Lacey Township Board appointing Robert J. Paladino superintendent on March 23, 1987, was not taken in good faith but was taken with the intent to deny successor boards any power of review. I **FIND** that this contravenes not only the ideals of open government but, equally importantly, the salutary purposes of probationary employment. The vital nature of the superintendency having been judicially recognized, I **FIND** public policy flaunted when no probationary period is provided, particularly where the appointee has had no prior experience as a superintendent.

In Karamessinis v. Wildwood Bd. of Ed., 1976 S.L.D. 473, 477, the Commissioner succinctly dealt with termination clauses:

> In the matter herein controverted, the Board and petitioner in 1972 entered into a contract, the terms of which required that the successor Board either notify petitioner of termination by March 31, 1973, or be bound to continuing contract for a period of one year. The Commissioner determines that such a provision automatically extending a contract in the event of failure of a successor board to act by a designated calendar date is ultra vires, void, and of no binding effect upon the successor Board. Petitioner's reliance thereon is misplaced. A successor board, within such a factual context, is not bound by omission of such notice, any more than it would be bound by the forthrigh (but illegal) offer to a superintendent of a second multi-year contract, ...
>
> This reasoning must apply all the more where renewal terms have consciously and specifically been omitted from the contract. It is well-established that a board of education is a noncontinuous body whose authority is limited to its own official life and whose actions can bind its successors only in

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those ways and to the extent expressly provided by statute. See, e.g., Gillian v. Toms River Reg'l School Dist. Bd. of Ed., 1874 S.L.D. 540.

I **CONCLUDE** that, on the eve of elections, the Lacey Township Board of Education then sitting entered a contract it knew and intended would remove from successor boards the right to review the petitioner's service and, on the basis of that review, determine whether the Board should perform "one of the most vital and responsible duties that a board of education can perform," Cullum, above, that of conferring tenure upon a superintendent of schools. I further **CONCLUDE** that this was an action not taken in good faith and therefore was an abuse of discretion, arbitrary and contrary to public policy. For these reasons, I **CONCLUDE** that the evidence adduced by the petitioner not only fails to carry his burden of persuasion but supports the Board's motion to dismiss.

The motion to dismiss is **GRANTED**. The petition of appeal is **DISMISSED WITH PREJUDICE.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

16 MAY 1988
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

MAY 17 1988
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

MAY 19 1988
DATE

OFFICE OF ADMINISTRATIVE LAW

ds

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ROBERT J. PALADINO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LACEY, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner filed timely exceptions pursuant to N.J.A.C. 1:1-18.4. The Board filed timely reply exceptions thereto.

Petitioner argues generally that the ALJ erred in his Findings of Fact, Conclusions of Law and recommended decision. More specifically, petitioner contends that he has a binding and enforceable contract with the Board and therefore, should be ordered reinstated to the position of superintendent of schools and provided all the salary and benefits due him under his contract.

Petitioner's Point I states:

> THE ALJ ERRED IN FINDING THAT THE INSTANT MATTER WAS "ON ALL FOURS" WITH CULLUM AND THOMAS

Petitioner contends there was no bad faith in the instant selection process as was present in Cullum v. Bd. of Education of Tp. of North Bergen, 15 N.J. 285 (1954). Contrary to Cullum, petitioner argues, he was found to be an acceptable candidate after a long and exhaustive search had failed to turn up finalists who would accept the offer of employment during the period designated for the search. Petitioner contends:

> In Cullum ***only three members of a five member board were present at a special meeting. The appointment was made without any discussion. Cullum was the only person notified to file an application; the board had agreed upon a 30-day period of "mourning" before beginning the search. None of the indicia of "bad faith" on the part of the respondent are present in the instant matter. (Exceptions, at p. 2)

Petitioner would also distinguish Thomas v. Board of Ed. of Morris Tp., 89 N.J. Super. 327 (App. Div. 1965), aff'd 46 N.J. 581 (1966). Averring that the issue in Thomas was whether a board could

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provide a superintendent a second multi-year contract, petitioner claims he received his first contract as superintendent of schools; in Thomas, the Court invalidated the second multi-year contract given the superintendent.

> ***The board's action was determined to be "an abuse of discretion, arbitrary and contrary to public policy." Thomas v. Bd. of Ed. of Morris Tp., 89 N.J. Super. at 335 (App. Div. 1965). The petitioner in the instant matter received a multi-year contract for three years and two months. This action clearly was within the board's authority under N.J.S.A. 18A:17-15, which provides that a board may appoint a superintendent of schools "for a term not exceeding five years." (Exceptions, at p. 3)

Petitioner contends that Thomas stands for the proposition that a superintendent may not be given a second multi-year contract while the original contract is still in effect. Petitioner would distinguish the facts herein as the contract in question was petitioner's first to serve as superintendent of schools.

Petitioner's Point II states:

> THE ALJ ERRED IN CONCLUDING THAT PETITIONER'S CONTRACT IS INVALID BECAUSE NO "PROBATIONARY PERIOD" WAS PROVIDED

Petitioner contends that

> Although a board may grant a superintendent of schools "early tenure," the respondent board did not do so. The board provides petitioner a contract which ran for 38 months. The petitioner could be removed from his position if there was "just cause." The contract, however, did not provide petitioner with tenure as superintendent.*** (Exceptions, at p. 4)

Petitioner contends he could only obtain tenure as superintendent under N.J.S.A. 18A:28-6(a) after "'the expiration of a period of employment of two consecutive calendar years in the new position unless a shorter period is fixed by the employing board for such purpose.'" (Exceptions, at pp. 4-5) Since no such shorter period was established in the instant matter, petitioner avers the contract did not provide him with tenure. Thus, petitioner contends, the decision of the board in the instant matter does not relate to the granting of tenure, but to the validity of rescinding a contract. The ALJ's conclusion that the contract is invalid because no probationary period is provided is in error, claims petitioner, because it is clearly within a board's prerogative to grant early tenure and to fix as short a period for obtaining tenure

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as it determines to be appropriate. "***The respondent board acted pursuant to statutory law in appointing petitioner as superintendent of schools. Therefore, its actions cannot be determined to have 'flaunted public policy' as the ALJ found." (Id., at p. 5)

Petitioner's Point III states:

> THE ALJ ERRED IN FINDING THE ACTION OF THE BOARD TO HIRE PETITIONER WAS NOT TAKEN IN GOOD FAITH, BUT WAS TAKEN WITH THE INTENT TO DENY SUCCESSOR BOARDS ANY POWER OF REVIEW, AND WAS AN ABUSE OF DISCRETION, ARBITRARY AND CONTRARY TO PUBLIC POLICY

Petitioner contends that the action of the Board herein in hiring him was a valid and reasonable decision to "promote an administrator who had been an outstanding employee." (Id., at p. 6) Citing Boult and Harris v. Bd. of Ed. of the City of Passaic, 1939-49 S.L.D. 7, aff'd State Board of Education 15, aff'd 135 N.J.L. 329 (Sup. Ct. 1947), aff'd 136 N.J.L. 521 (E. & A. 1948), petitioner contends that "[t]he mere timing of the hiring cannot serve to invalidate it" because

> Decisions of boards of education have long been accorded the presumption of validity and should not be overturned unless the board violated the law, acted in bad faith, or demonstrated a shocking abuse of discretion. (emphasis in text) (Exceptions, at p. 6)

Petitioner avers there is no evidence of dishonesty on the part of any members of the hiring Board, nor did the Board violate the law, act in bad faith or abuse its discretion. Thus, petitioner claims the action of the Board in hiring him should be declared valid and should not have been rescinded by the successor Board.

Petitioner's Point IV states:

> THE RESPONDENT BOARD ACTED ARBITRARILY, CAPRICIOUSLY AND UNREASONABLY IN TERMINATING PETITIONER AS SUPERINTENDENT OF SCHOOLS, RESCINDING HIS CONTRACT, AND REDUCING HIS CONTRACT, AND REDUCING HIS SALARY IN VIOLATION OF N.J.S.A. 18A:6-10

Petitioner claims that five weeks after his appointment he was terminated as superintendent of schools, notwithstanding that he had received no negative evaluations regarding his performance. He avers that since he had the qualifications and certification required for the position of superintendent of schools, the respondent Board could not unilaterally terminate petitioner, rescind his contract, and reduce his salary to that provided to principals. Citing Hilton Hotels Corp. v. Piper Co., 214 N.J.

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Super. 328 (Ch. Div. 1986), for the proposition that "***contracts may only be rescinded where there is either original invalidity, fraud, failure of consideration or a material breach or default" (at 336), petitioner contends that none of those factors were present regarding his contract. Since he satisfactorily performed under the contract, the only action which should be declared invalid, in petitioner's opinion, is the action in which petitioner was terminated as superintendent of schools.

> ***Said action was demonstrative of bad faith on the part of the board. ***The new board was determined to remove petitioner as a sign of its exercise of political power after the election. Its decision to terminate petitioner was not related to the education of the students in the district and was arbitrary, capricious, and unreasonable. (Exceptions, at pp. 7-8)

Petitioner's Point V states:

> THE BOARD'S MOTION FOR SUMMARY DECISION SHOULD BE DISMISSED BECAUSE THERE ARE GENUINE ISSUES OF FACT

Citing Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67 (1954) for the standard necessary to grant summary decision, petitioner avows that the ALJ erred in concluding that the hiring was done in bad faith, on the basis of the testimony of petitioner's witnesses. Rather, petitioner contends that his witnesses have testified that a majority of the Board voted to hire him, whom they considered to be a qualified candidate and outstanding choice as superintendent of schools. Suggesting that there are facts in dispute regarding the appointment of the petitioner as superintendent of schools, petitioner claims that summary decision is therefore inappropriate in this case.

Petitioner submits that respondent's motion for summary decision should be denied and the matter remanded to the Office of Administrative Law for further hearing.

The Board's reply exceptions are extensive. Following a recitation of its version of the facts, the Board posits the following reply exceptions.

POINT ONE

THE ALJ'S FINDINGS ARE AMPLY SUPPORTED IN THE RECORD

Relying on Thomas, supra, and Cullum, supra, the Board claims the ALJ's finding that there was a lack of exercise of discretion and an arbitrary determination made by the Board when it appointed petitioner to the position of Superintendent of Schools on March 23, 1987 was accurate.

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> ***As [the ALJ] pointed out, there was no record of any discussion, before or after the motion on March 23, 1987 concerning the appointment. His finding that the action was not taken in good faith but was taken with the intent to deny successive Boards any power of review comes directly from the mouths of the Petitioner and his witness Laffey, Scanlon and Murphy. His finding that this contravenes not only the ideals of open government but, equally important, the salutary purposes of probationary employment is likewise amply supported in the testimony of Petitioner and his witnesses as set forth in the Statement of Facts herein. Clearly the intention was to eliminate the probationary period, grant the Petitioner tenure and prevent any future Board from acting with reference to the Office of Superintendent. To conclude anything other, than that such action was not taken in good faith and therefore was an abuse of discretion, arbitrary and contrary to the public policy would, in and of itself be an abuse of discretion.
>
> (Reply Exceptions, at pp. 30-31)

The Board avers that the meeting of March 23, 1987 had been called to consider the appointment of a Superintendent, but that there were no deliberations and the public had no timely opportunity to be heard on the matter. It claims "***the majority had, in advance, agreed upon the appointment of the Petitioner. The open meeting held on March 23, 1987 was therefore nothing more than a sham and should be dealt with as if it had never occurred as set forth in Cullum." (Id., at p. 33)

Further, the Board contends that petitioner's statement that he was found to be an acceptable candidate after the search for a superintendent had failed to turn up a finalist who would accept the position is an "absurdity." (Id.) The Board states that all three Board witnesses who were testifying on behalf of petitioner stated that he had been eliminated from the process long before the Board ever got to March 23, 1987. The Board avers that petitioner was given an interview with the Board only as a courtesy as an in-house applicant.

Thus, the Board contends that the ALJ's findings are amply supported in the record and should be adopted.

POINT TWO

THE ALJ CORRECTLY CONCLUDED THAT THE CONTRACT WAS INVALID

The Board avers that the record is replete with statements from petitioner and his witnesses that the majority of the Board and

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the petitioner intended that tenure be granted. "Both Mrs. Laffey and Mrs. Scanlon specifically said the intent was to bind future Boards." (Reply Exceptions, at p. 34) The Board relies on Thomas, supra, and Rall v. Bd. of Ed. of the City of Bayonne, 54 N.J. 373 (1969) for the proposition that a board cannot avoid the probationary period required to achieve tenure by entering a long-term employment contract.

> Accordingly, the Petitioner's statement in Point II of his Exceptions that the Board could have fixed as short a period for obtaining tenure as it determined to be appropriate, is in error as a matter of law. Clearly, simply taking the testimony of the Petitioner and his witnesses at face value, the Administrative Law Judge could have concluded nothing other than that there was no probationary period intended. In a case where an appointee has had no prior experience as a superintendent, or even as an assistant superintendent, and is without any central office experience whatsoever, the conclusion that the granting of tenure without a probationary period flaunts public policy is one well founded in reason and law. (Reply Exceptions, at pp. 35-36)

The Board poses the following position:

> ***On the one hand, if the contract does in fact grant tenure to the Petitioner, it is void as against public policy. On the other hand, if it is found that notwithstanding its admitted intention to do so, that it fails to do so, there was never a meeting of the minds and the contract is subject to rescission. (Id., at p. 36)

Thus, claims the Board, the finding of the ALJ that the petitioner's purported contract (R-25) is invalid is amply supported in the record and law and should be adopted.

POINT THREE

> PETITIONER'S HIRING WAS TAKEN IN BAD FAITH. IT WAS ABUSE OF DISCRETION, ARBITRARY AND CONTRARY TO PUBLIC POLICY

The Board reiterates its position that

> ***what took place on March 23, 1987, was pre-planned by a majority of the Board without consultation with the minority of the Board or any disclosure to the public. It is inconceivable to the Board that the decision can be made on March 2, 1987, that the Petitioner is not qualified for the position and then on

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> March 23, 1987, suddenly find the Petitioner had become qualified for the position. When speaking of an appointment of Superintendent of Schools, to simply state the proposition that such could reasonably have been concluded is to state bad faith. (Id., at p. 37)

The Board avows that petitioner is correct in stating that the Board did conduct an exhaustive search for a superintendent. However, the Board claims petitioner fails to state that the first Board then completely ignored the result of the search. The Board claims that petitioner's own witnesses testified that Dr. Beers, who was ultimately appointed superintendent of schools by the new Board, had stated his willingness to serve provided the selection was made after the April 7, 1987 election. "It is obvious that Dr. Beers, an educator with over twenty (20) years of experience as a Superintendent of Schools, informed the Board of that fact when he realized the political maneuvering that the majority was conducting." (Id., at p. 38) The Board avows that the selection of petitioner on March 23, 1987 could not be characterized in any way other than as an arbitrary act which was contrary to public policy and an abuse of discretion. It urges the ALJ's finding in this regard be adopted.

POINT FOUR

THE PETITIONER WAS PROPERLY REMOVED AS SUPERINTENDENT

Citing Kopera v. West Orange Board of Education, 60 N.J. Super. 288, 294 (App. Div. 1966) and Dore v. Bedminster Township Board of Education, 185 N.J Super. 447 (App. Div. 1982) for the proposition that a board of education's decision not to renew a nontenured teaching staff member is not only within the board's discretion, but also is presumed valid and will only be overturned if it is shown to be arbitrary or induced by improper motives, the Board contends there was nothing arbitrary about its action of April 29, 1987 removing petitioner from his employment status as superintendent and returning him to his tenured position as a principal, pursuant to N.J.S.A. 18A:27-10.

> Petitioner has attempted to make much of the failure of the Board to provide him with a written evaluation. The Petitioner admits that he had reviewed his abilities and performance on separate occasions with the President and Vice President of the Board. The Petitioner further admitted that he was not in a position to adequately represent the Board at a critical meeting with the Township Committee dealing with the defeated budget. Even Mrs. Laffey, a supporter of the Petitioner, testified that no defense was offered for the budget that was

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> defeated. That the Petitioner did not receive written evaluations is not a basis to deny the Board the right to the benefit of N.J.S.A. 18A:27-10 or to the benefit of removing someone that was not qualified. Clark vs. Board of Education of the Borough of Lawnside, Camden County, 81 S.L.D. decided April 6, 1981.
>
> (Reply Exceptions, at p. 44)

The Board's position is that in reviewing petitioner's qualifications for the job, it "simply decided that it needed a person of greater experience." (Id., at p. 45) The Board urges that "[t]he position of Superintendent of Schools is certainly one of the most important in the school district, Thomas, supra, at p. 234, and the new Lacey Board properly and legally removed Petitioner from his non-tenured position." (Id., at p. 46)

Further, the Board contends that regardless of the number of days' notice required or not required by an individual employment contract, N.J.S.A. 18A:27-10 provides that a nontenured teaching staff member may be terminated if notified prior to April 30. Averring that the statute takes precedence over a contract, the Board claims the April 30th date became part of petitioner's contract. Since petitioner's contract was terminated on April 29, 1987 at the Special Meeting held by the newly seated Board, the Board contends that it was within the bounds of the law in terminating a nontenured teaching staff member from his position before April 30.

POINT FIVE

MOTION TO DISMISS WITH PREJUDICE WAS PROPERLY GRANTED

In rebuttal to petitioner's Point Five in his exceptions where it is asserted that the Board's Motion for Summary Decision should not have been granted, the Board states preliminarily, that

> ***the Board, at this juncture in the case, had not made a Motion for Summary Decision. Rather, the Board had made a Motion to Dismiss the Petition at the conclusion of the Petitioner's case on the basis that giving the Petitioner all reasonable inferences that could possibly be given, that upon the facts established and upon the law, that the Petitioner had shown no right to relief. Accordingly, Petitioner's reference to Judson v. People's Trust & Trust Co. of Westfield, 17 N.J. 67 (1954) is inappropriate as is the balance of the argument.
>
> (Reply Exceptions, at p. 48)

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The Board notes that prior to the start of trial, the Board had filed a Motion for Summary Decision supported by legal brief and affidavit. However, this motion was denied by the Judge, the Board submits, on the basis that factual issues existed at that juncture of the case. "However, these factual issues were clearly and convincingly eliminated by the testimony adduced during Petitioner's case." (Id., at p. 49) The Board argues that a review of the testimony as set forth in the statement of facts, as well as the exhibits that were produced at trial, can lead to no other conclusion than that petitioner has failed to carry his burden. Accordingly, the Board contends, the ALJ's decision to dismiss the petition with prejudice should be approved.

POINT SIX

PETITIONER IS NOT ENTITLED TO ADDITIONAL COMPENSATION

In rebuttal to petitioner's argument that the absence of a fixed number of days' notice in effect deprives the Board of the benefit of the statutes and provides that no notice may be given, thereby entitling him to the enhanced compensation and benefits of superintendent of schools under the contract as compared to the salary of an elementary school principal, the Board avers such a contention is "inconsistent with a fair and logical reading of the contract and is contrary to the statutes and public policy of this State." (Id., at p. 50) The Boards claims:

> All the contract clause cited indicates is that there is no definite number of days' notice required to terminate. In short, the contract could be terminated by either side without notice. The last phrase of that clause, "it shall run for the full term named above," simply states what every employment contract suggests, that is, that the parties contemplate that it may run for the duration of its term. The contract therefore provides nothing more than the terms and conditions of employment if, in fact, it had run its full term. However, the mere execution of an employment contract by a teaching staff member does not mean that it cannot be terminated prior to its expiration date. Canfield v. Bd. of Ed. of Pine Hill Borough, 51 N.J. 40 (1968). When an employee is serving during a probationary period, employers, including public employers, have a right to discharge that employee with or without cause. Nicoletta v. North Jersey District Water Supply Comm., 77 N.J. 145 (1978). It must be emphasized that if Petitioner's interpretation that the clause cited does not permit termination were accepted by the Commissioner, then the clause would be void as against the public policy enunciated by N.J.S.A.

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> 18A:27-10. No contract can be allowed to abrogate this clearly stated policy.
> (Id., at pp. 50-51)

Further relying on the language of N.J.S.A. 18A:28-6 which reads in pertinent part as follows:

> ***and in the event the employment in such new position is terminated before tenure is obtained therein, if he then has tenure in the district or under said board of education, such teaching staff member shall be returned to his former position at the salary which he would have received had the transfer or promotion not occurred together with any increase to which he would have been entitled during the period of such transfer or promotion. (emphasis added)
> (Reply Exceptions, at p. 51, quoting N.J.S.A. 18A:28-6)

The Board avers that it followed the statutory mandate in the instant matter.

> ***Petitioner was returned to his tenured position as principal at the salary to which he would have been entitled had his earlier promotion not occurred with one exception. That is, the Board chose to pay the Petitioner at the enhanced salary through the end of the 1986-87 school year. Thereafter, the Petitioner was returned to the salary level of a principal. It is submitted that the statute addressed this problem and that the Respondent has complied with the statute. (Reply Exceptions, at p. 52)

The Board argues that the statute requires that one removed from a nontenured teaching staff position, after a promotion, shall be returned to his or her former position at the salary to which he would be entitled in that position. Further, the Board cites Dore, supra, for the proposition that the lack of strict compliance with the evaluation procedures did not justify the granting of any financial reward.

Accordingly, the Board urges the Commissioner to adopt the findings and conclusions of the ALJ and direct the dismissal of the Petition of Appeal with prejudice.

Upon his careful and independent review of the record before him, which it is noted includes the transcripts of the hearing below, the Commissioner reverses the initial decision for the reasons that follow.

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At the outset, the Commissioner notes that neither party's exceptions or reply exceptions cite particular page or line references to the transcripts in proffering their respective positions as to the import of the testimony taken below. In this regard, the Commissioner relies on the instruction cited by the Appellate Division Court in In re Morrison, 216 N.J. Super. 143 (App. Div. 1987) wherein it states:

> In the instant case Morrison was provided with a copy of the ALJ's initial decision and did file detailed exceptions. Pointing out such errors is meaningless, however, if the agency is unable to assess the merits of those exceptions absent a copy of the relevant portions of the transcript. Thus, a meaningful review necessitates that the agency be supplied timely with at least those parts of the transcript. It must then review those portions which relate to material issues which are raised by the exceptions. We pause here to observe that while the APA does not delineate precisely who must bear the responsibility and cost of providing the necessary transcript in such instances, N.J.S.A. 52:11B-9(e), we conclude that such burden must fall on the party asserting any exceptions which reasonably require agency reference to and review of the relevant parts of the record. N.J.A.C. 1:1-16.4(b). (emphasis supplied) (at 157-158)

In this case, while provided with the transcripts, both parties failed to delineate which portions, specifically, they relied upon in making exceptions and replies. Thus, the parties' arguments as to the ALJ's findings cannot be properly rejected or accepted by the Commissioner since the parties failed to specify which portions of the record they deemed relevant to their respective exceptions.

However, based on his own independent review of the transcripts of the testimony elicited below, the Commissioner finds no evidence of bad faith in either the first Board's action in appointing Mr. Paladino or in the new Board's removal of him thereafter.

Neither the Petition of Appeal, the answer, nor any of the arguments presented by counsel seriously argue any violation of the Open Public Meetings Act. That it is argued by the Board that the appointment was invalid because there were inadequate full-Board deliberations and the public had insufficient opportunity to be heard on the matter is deemed to be inaccurate. First, nowhere in law is there a requirement that the public be consulted in the selection process of a superintendent of school. Moreover, there is

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adequate indication in the record that the public was invited to attend the open public meeting concerning the hiring of petitioner, as well as considerable input from the public on the issue of his removal. See TR I - 136-137. See also TR II - 22.

As to whether there was adequate deliberation by the first Board in installing petitioner, the Commissioner will not substitute his judgment for that of the Board in its decision-making process absent bad faith or a demonstrated abuse of discretion. See Boult and Harris, supra. The Commissioner cannot find that the 22-minute meeting of March 23, 1987 was an unreasonably short measure of time in which to decide, as a Board, on the selection of a superintendent. The open public portion of the meeting, wherein the official vote was cast, which it is noted, included both members of the majority and minority of the Board voting 4-3 to appoint Mr. Paladino as superintendent, was properly conducted, and was preceded by a closed session wherein it is undisputed seven members of the board were present. Nowhere in the record is there any allegation of minority objection to taking a vote that night on the matter. Similarly, no absentions are noted. Thus, it cannot be seriously argued that, as in Cullum, there was no meeting of the minds in the Board's decision based upon minority "boycott." (See Cullum, supra, at p. 292.)

Similarly, the Board membership voted again, with public input, and without objections from the minority membership of the Board, to a vote to approve the contract drafted by the Board attorney regarding the specifications of employment on the eve of the school elections, April 6, 1987. At that time the Board again discussed the contract in private session, majority and minority members present, beforehand. The Commissioner finds no evidence in the record before him of Board member dissatisfaction with either the proceedings involved in appointing and approving petitioner's contract for employment nor in voting on the particular candidate in question in advance of the election of the new Board. See TR III - 146-147. Thus, contrary to the finding of the ALJ below, the Commissioner finds Cullum, supra, distinguishable from the instant matter, and the ALJ's finding of bad faith relying on Cullum erroneous. Neither does he find evidence of bad faith in appointing a personnel committee to conduct preliminary interviews, nor anything illegal in conducting such interview on board a boat, albeit unorthodox. The primary concern in a board's selection of an employee using such a committee lay in the board's being fully briefed by such committee, in accordance with the dictates of the Open Public Meetings Act. No one herein seriously argues failure of the committee to provide such complete information to the first Board. Moreover, petitioner was afforded an opportunity to present his application for employment in person before the Board; notice was duly provided the public of meetings relative to discussions of this personnel matter; and the board deliberated as a body in choosing its appointee. See TR III - 37, 151. See Thomas, supra, at 334, citing Cullum, supra, at 292.

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Further, the first Board was well within its authority to "complete [its] job" (See TR I - 226) of hiring petitioner by March 23, 1987, two full weeks before the elections. In no way can bad faith be inferred from its acting to do so suggesting that such appointment was a power play to bind future Boards since there could be no means of knowing what the election results would be or whether said election would result in a change in the composition of the Board's majority. Such argument suggesting bad faith is, thus, dismissed as being without merit.

Similarly, the Commissioner finds without merit the Board's argument that the first Board's intent was to deny successive Boards any power to review petitioner's appointment as superintendent by granting him immediate tenure in his position. On the contrary, the Commissioner's review of the record comports with petitioner's that the Board's intent was to confer tenure on him only after serving the requisite period of time in conformity with N.J.S.A. 18A:28-6. See TR I - 159 wherein Board president Laffey stated:

> CONTINUATION BY MR. SCHUMACHER:
>
> Q Let me restate the question.
>
> What was the Board's intention by entering into this contract regarding Mr. Paladino's future in that school district?
>
> A Mr. Paladino had spent, I think 13 years as an administrator in that district.
>
> The Court: Not responsive. What was the Board's intent approving this contract?
>
> The Witness: When we had School Boards, we were, so that it was common to give a multi-year contract and over the term of that contract, Mr. Paladino would have received tenure.
>
> Actually, he would receive it two days -- two years and one day after, which would fall into that period. (emphasis supplied)

See also TR III - 40-41 wherein Mr. Murphy, personnel chairman of the first Board stated:

> Q And prior to Mr. Roeber being contacted, did you speak with any other Board members about Mr. Paladino's desire to have a clause in there which would not allow him to be terminated?

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A Yes, I believe it was discussed with the entire Board at the private session. Prior to the approval of the contract, we discussed it.

Q Do you remember any of the content of that discussion?

A Oh, there was controversy concerning -- as to whether or not we were offering him tenure in the job, if that was the intent or the purpose of the contract. As I stated to them at that time, it was the purpose was not to offer the man tenure. It was a request of his, and it was part of the negotiations to give him the job. Tenure is not necessarily automatic as far as the superintendent is concerned. We checked this with Mr. Schlaffer, because Mr. Schlaffer informed us if the man doesn't -- does not meet the qualifications of the Board, it wouldn't matter what it says in the contract, he wouldn't be able to hold the job.

Q By including this provision in the contract, Mr. Murphy, what was your understanding as to its affect (sic)?

A It adds to the effect that we were giving the man a secure sincere contract. That was part of his thing he had negotiated with the Board, and it was our intent to show the, I guess, the sincerity of the Board and our belief that we wanted a person up there to lead the district for a substantial amount of time. We want him to know that he's got the time in which to correct the problems that were within the district. (emphasis supplied) (TR III - 40-41)

Thus, contrary to the finding of the ALJ below, the Commissioner finds that it was not the Board's intention to confer automatic tenure upon petitioner in his role as superintendent of schools. He adopts as his own petitioner's argument stated in his exceptions in this regard:

POINT II

THE ALJ ERRED IN CONCLUDING THAT PETITIONER'S CONTRACT IS INVALID BECAUSE NO "PROBATIONARY PERIOD" WAS PROVIDED

The ALJ relies heavily on Thomas, supra, in which the Appellate Division states that a contract which ran for a period during which the superintendent would receive tenure, in effect, "clothes him with tenure." This conclusion and

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reliance on the Appellate Division decision in Thomas is in error. The Supreme Court, in affirming the lower court in Thomas, stated the following:

> "We reserve, however, the question whether mere execution of the three-year contract of employment entered into on August 18, 1961 between Thomas and the Board of education even if it had been a valid one, would have given tenure to Thomas." Thomas v. Bd. of Ed. of Morris Tp., 46 N.J. 581 (1966)

Although a board may grant a superintendent of schools "early tenure," the respondent board did not do so. The board provides petitioner a contract which ran for 38 months. The petitioner could be removed from his position if there was "just cause." The contract, however, did not provide petitioner with tenure as superintendent. Petitioner, as a tenured principal in the district, could only obtain tenure as superintendent of schools under N.J.S.A. 18A:28-6(a) after "the expiration of a period of employment of two consecutive calendar years in the new position unless a shorter period is fixed by the employing board for such purpose." The board did not fix a shorter period. Accordingly, the contract did not provide petitioner with tenure. (emphasis supplied) (Exceptions, at pp. 4-5)

The Commissioner does not agree with petitioner, however, that the matter before him involves rescission of a contract, since by his own admission it is herein found that there was an express meeting of the minds between the Board and petitioner that he did not serve under tenure from the outset of his contract, but rather, that he would first be required, as provided by statute, to serve the requisite probationary period, pursuant to N.J.S.A. 18A:28-6. Such argument, therefore, is dismissed as being without merit.

Thus, as it was legally permissible, as established above, for the first Board to appoint petitioner to his nontenured position as superintendent of schools, it was no less legally permissible for the newly installed Board to remove petitioner from his position, so long as it did so in conformity with law. See Canfield, supra. Because the instant contract contained no termination clause, and because petitioner was nontenured, the Board was well within its rights to terminate petitioner's employment as superintendent of schools, so long as it was prepared to compensate him in accordance with the provisions of the contract and so long as its terminating

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him did not violate his constitutional rights. It is well-established in decisional law that where a contract contains no provision for termination on notice by either party, as is the case in the instant matter, "the contract can only expire by its own terms***." Luther McLean v. Board of Education of the Borough of Glen Ridge et al., 1973 S.L.D. 217, 226. See also, Lawrence Parachini v. Board of Education of the City of Union City and Robert Menendez, 1976 S.L.D. 515. Thus, notwithstanding that the new Board may have believed it had just cause to terminate petitioner herein for want of experience, it was, in the absence of a termination clause, obliged to honor the terms of the contract if it chose to terminate Mr. Paladino by compensating him according to the terms set forth in the three-year contract.

Thus, the Commissioner determines herein that (1) the employment contract between petitioner and the first Board was valid; (2) said contract, spanning the time from March 24, 1987 to June 30, 1990 contained no specific notice of termination provision; (3) the new Board was within its rights to terminate petitioner, a nontenured superintendent of schools, in accordance with the provisions of N.J.S.A. 18A:28-6; and (4) under the terms of the contract, the new Board, in terminating petitioner, whether for just cause or not, was obliged to pay him according to the terms as set forth therein concerning salary compensation and benefits.

Accordingly, the Commissioner finds and determines that the contract between petitioner and the first Board was binding, albeit lacking a specific termination clause. Thus, the Commissioner finds no basis for voiding the contract or rescinding it. The Commissioner further finds, contrary to the determination of the ALJ below, that there was no bad faith in the first Board's actions in employing petitioner as superintendent of schools and, thus, that the new Board was within its power to terminate petitioner's services as superintendent, so long as it acted in compliance with N.J.S.A. 18A:28-6 and the terms of the contract in question. Finally, the Commissioner finds that in so terminating petitioner from that role and returning him to his former position as a tenured elementary principal, the new Board must honor the terms of the contract and, thus, is hereby directed to pay to petitioner all emoluments and salary due him under the contract for employment discussed herein through June 30, 1990, less that salary he receives as principal of the elementary school where he currently serves.

COMMISSIONER OF EDUCATION

July 1, 1988

Pending State Board

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7304-87
AGENCY DKT. NO. 317-10/87

BOARD OF EDUCATION OF THE
MAINLAND REGIONAL HIGH SCHOOL
DISTRICT, ATLANTIC COUNTY,
Petitioner,
v.
JOAN PETERSON AND JOAN MERLINO,
Respondents.

Keith A. Bonchi, Esq., for petitioner (Donio, Bertman, Johnson, Salili and Greco, attorneys)

George L. Seltzer, Esq., for respondents (Alten, Valentine and Seltzer, attorneys)

Record Closed: April 5, 1988 Decided: May 23, 1988

BEFORE LILLARD E. LAW, ALJ:

STATEMENT OF THE CASE

The Board of Education of the Mainland Regional High School District (Board) alleges that respondent knowingly executed a false affidavit of residency thereby permitting the son of Joan Peterson to attend its schools illegally. The Board seeks tuition payment in the amount of $5,534.64.

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PROCEDURAL ASPECTS

The Board filed its Petition before the Commissioner of Education on October 19, 1987. Respondents submitted their Answer to the Petition before the Commissioner on October 26, 1987. On November 2, 1987, the Commissioner transmitted the matter to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. Thereafter, on January 5, 1988, a prehearing conference was conducted by the undersigned at which, among other things, the issues to be determined by this tribunal were agreed upon by counsel for the parties and the dates of March 14 and 15, 1988 were established as the dates of hearing. The hearing was held on March 14, 1988 at the Atlantic City OAL, the Atlantic County Civil Courthouse, Atlantic City, New Jersey. The parties submitted posthearing memoranda, the last of which was received on April 5, 1988, which constitutes the closing date of the herein record.

ISSUES

The issues to be determined are as follows:

1. Whether T.P., a minor, actually resided in the City of Northfield during the period of 1985-86, 1986-87 until April 1, 1987, while he attended the Board's schools?

2. Whether Joan Merlino solely supported T.P. as affidavit pupil during those periods, pursuant to N.J.S.A. 18A:38-1?

3. Whether Joan Peterson resided with Joan Merlino during those periods and supported T.P.?

4. Whether petitioner is estopped from alleging non-support of T.P. at the time of the execution of the affidavit by virtue of advise given to respondents by petitioner?

STIPULATIONS

At the conclusion of the Board's case-in-chief, the parties spread on the record the following stipulations:

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1. In the event the petitioner Board prevails in this matter, the parties agree that the tuition due and owing to be the sum of $5,534.64.

2. The parties stipulate to T.P.'s attendance at the Board's school as January 30, 1986 through June 30, 1986 and September 1986 through to April 1987.

UNCONTESTED FACTS

A review of the herein record demonstrates certain facts which are neither disputed nor contested. Those uncontested facts are set forth hereinbelow as follows:

1. Joan Peterson is the mother and natural parent of T.P. a minor son aged 17 years; Joan Merlino, a married daughter and a respondent herein; a son, Garrett Turnbull; and a son identified only as Gregory.

2. During the controverted period, January 30, 1986 through April 1, 1987, Joan Peterson was the named lessee for the premises known as 306 Ocean Plaza, Longport, New Jersey, t/a the Longport Ocean Plaza Condominium Association.

3. At the time of the herein hearing, T.P. was 17 years of age. His date of birth being February 23, 1971.

4. During the 1986-86 school year T.P. was enrolled in the Holy Spirit High School, Absecon, New Jersey, from September 4, 1985 until he was withdrawn on November 22, 1985 (Exhibit P-3).

5. T.P.'s first quarter grades while at Holy Spirit High School were as follows:

Subject	GRADE
Church Hist.	F
PE I	P
C Engl I	D
C Lang Art	F
G Math I	F
C Earth SC	D

(Exhibit P-3)

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6. Thereafter, T.P. was enrolled in the Atlantic City High School. The Borough of Longport is a nonoperating school district which sends its pupils to the Board of Education of the City of Margate which, in turn, has a sending-receiving relationship with the Board of Education of the City of Atlantic City. Consequently, as a bona fide resident and domiciliary of Longport, T.P. was eligible to attend the Atlantic City High School without any tuition obligations falling upon Joan Peterson.

7. The record shows T.P.'s grades while he attended Atlantic City High School, during the 1985-86 school year from November 1985 up to January 29, 1986, to be as follows:

Class	Grade	Credit
English 1 FND	F	9
Reading Lab	F	9
Science 1 FND	F	9
Physical Ed.	F	9
Gen Math FND	F	9

(Exhibit P-4)

8. On or about January 22, 1986, Joan P. Merlino executed an affidavit which states, in pertinent part, as follows:

AFFIDAVIT

STATE OF NEW JERSEY)
COUNTY OF ATLANTIC) as
)

I, JOAN MERLINO, of full age, being duly sworn according to law, depose and say:

1. I am a resident and homeowner in Northfield, New Jersey.

2. I reside with my husband, Ciro Merlino at 3 Madison Avenue, Northfield, New Jersey.

3. My brother, [T.P.] and mother, Joan Peterson are residing with me until their home is built in Fischer Woods, Linwood, New Jersey.

I swear that the foregoing statements made by me are true.

[Signed]
Joan Merlino
sworn and subscribed
22nd day of January, 1986.

(Exhibit P-7)

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9. On or about January 29, 1986, Joan Peterson enrolled and registered T.P. in the Board's high school giving the address of Joan Merlino as the resident address of both Joan Peterson and T.P. (Exhibit P-1)

10. On January 31, 1987, Detective Kenneth William Adams of the City of Linwood Police Department conducted an investigation concerning a reported theft and interviewed T.P. Detective Adams' Investigation Report lists T.P.'s address as:

306 Ocean Plaza Apts. Longport, N.J.
823-8342 (Exhibit P-9)

11. On April 15, 1987, Joan Peterson executed a Change of Address Order with the United States Postal Service, listing her old address as:

Ocean Plaza 306
2700 Atlantic Avenue
Longport, N.J. 08403

To the new address as:

1 Spring Lane
Linwood, NJ 08221 1343 (Exhibit P-5)

12. The Mainland Regional High School District is composed of three constituant school districts including and limited to: The City of Linwood, the City of Northfield and the City of Somers Point.

CONTESTED FACTS

Kathryn Urbon, Attendance Officer (A.O.) at the Board's high school testified, among other things, that one of her duties is to investigate alleged nonresident pupils attending the Board's high school. At some point in time the A.O. was made aware that T.P. was having attendance problems at the Board's high school. This caused Ms. Urbon to investigate by placing a telephone call to the Northfield adddess listed as T.P.'s residence. Ms. Urbon spke with Joan Merlino who stated that T.P. was ill and, therfore, not in attendance at school. Ms. Urbon never spoke with Joan Peterson at the Northfield address, however, she did speak with Peterson at Peterson's workplace until the workplace telephone was disconnected. Petitioner was employed at divers time as a legal secretary with law firms in the Atlantic City area.

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Ms. Urbon testified that she and the Board's school officials began to question T.P.'s resident after the school had received telephone calls from Longport asserting that T.P. could not get to school. At times staff members observed and reported to Urbon that T.P. exit from his mother's automobile which had arrived to the school from the direction of Somers Point rathar than Northfield.

As a consequence of this and other information, Ms. Urbon commenced her investigation of T.P.'s residency in or about January 1987. The A.O. went to the Longport Condominium known as Ocean Plaza, and spoke with the manager and a maintenance person identified respectively as Catherine Karver and Marvin James. Both individuals indicated to Ms. Urbon that T.P. resided at 306 Ocean Plaza, 2700 Atlantic Avenue, Longport, New Jersey. Ms. Karver confirmed that Joan Peterson was the lessee of record and had been so for more than one year. Ms. Karver and Mr. James indicated that Joan Peterson, T.P. and Garrett Turnbull all resided at 306 Ocean Plaza.

Ms. Urbon contacted Garrett Turnbull, T.P.'s brother and Peterson's son, who asserted that he was a building contractor and the building contractor of record to build and construct a house at 1 Spring Lane, Linwood, New Jersey. Turnbull stated to Urbon that Joan Peterson and T.P. could possibly acquire occupancy of the new home in March 1987.

As a consequence of a criminal complaint having been filed with the Linwood City Police Department concerning T.P. an alleged theft of a go-cart from the high school auto repair shop (Exhibit P-9), Ms. Urbon contacted Detective Adams who reported that he had contacted Joan Peterson by way of her home telephone which was listed at 306 Ocean Plaza, Longport, (Exhibit P-8).

The A.O. testified that she subsequently talked with officials at the Margate branch of the United States Postal Service which reported that Joan Peterson had executed a change of address from Ocean Plaza on April 18, 1987. The Postmaster had indicated to Ms. Urbon that mail addressed to Joan Peterson prior to April 18, 1987 was delivered to the Ocean Plaza address (Exhibit P-5).

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Ms. Urbon asserted that she had driven her automobile past the Merlino residence on Madison Avenue, Northfield between the time of 6:30 a.m. and 7:00 a.m. and did not observe Joan Peterson's motor vehicle for a period of over a week and one-half in January and February 1987.

Ms. Urbon testified that the Board has an affirmative policy with regard to nonresident pupils attending its schools. She asserted that the Board agressively pursues the nonresident and requires that tuition payments be made for the time the nonresident pupil attended its schools. In connection thereto, Urbon asserted that she had communicated with Joan Peterson with respect to T.P.'s residency and domicile within the school district. It was Urbon's opinion that this discussion with Peterson prompted the Merlino affidavit to be executed (Exhibit P-7).

Detective Kenneth Adams testified that he conducted an investigation of T.P. and spoke with both T.P. and Joan Peterson by way of the telephone listed for 306 Ocean Plaza, Longport. The address and telephone numbers were supplied to the detective by the victim, William Borrelli who resides in Longport.

Jay S. Berhardt, Margate branch of the United States Postal Service testified, among other things, that prior to April 15, 1987, Joan Peterson received her mail at the Ocean Plaza address. Berhardt asserted that he had talked with the mail carrier and that mail was accepted at the Ocean Plaza address prior to April 15, 1987. Berhardt asserted that anyone may execute a Change of Address for anyone else so long as the official document is signed. Berhardt testified that a Change of Address would not effect a Post Office Box nor did he know whether or not Turnbull received mail at the Ocean Plaza address.

Catherine Karver, manager of Ocean Plaza, testified, among other things, that Joan Peterson moved into unit 306, Ocean Plaza, in March 1983 and moved out of the unit on or about April 1, 1987 at the expiration of the lease period. Karver asserted she saw both T.P. and Joan Peterson at Ocean Plaza on a regular basis during 1986.

Ms. Karver testified on cross-examination that Garrett Turnbull lived at 306 Ocean Plaza, however, there was no lease for Mr. Turnbull. She stated that she saw

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Turnbull at the condominium on a regular basis until April 1987. Karver asserted she was unaware that T.P. and Joan Peterson had moved to Northfield in January 1986, moreover, she had seen T.P. on a regular basis between the hours of 9:00 a.m. to 5:00 p.m. subsequent to that date.

Marvin H. James, Supervisor of Maintenance at Longport Ocean Plaza, testified that he knew both T.P. and Joan Peterson. During his work week of Monday through Friday in 1986, James saw both T.P. and Joan Peterson on a regular basis. During that year, James saw T.P. almost every day. He asserted that he did not know whether the apartment 306 was rented by Garrett or Joan Peterson.

Joan Peterson testified, among other things, that prior to January 30, 1986, she lived at unit 306, Ocean Plaza, Longport, with her two sons, T.P. and Garrett Turnbull. She asserted that the apartment had only two bedrooms which required that T.P. sleep on a pull-out convertable bed. She asserted that the apartment in the condominium was crowded and contained Turnbull's furniture, rather than hers. She admitted that T.P. was a poor student and that he had received low grades. She had enrolled T.P. in Holy Spirit High School for his ninth grade rather than send T.P. to the Atlantic City High School which was tuition free. T.P. left Holy Spirit High School before the end of the first semester of the 1985-86 school year because of low grades and was enrolled in the Atlantic City High School in November 1985. T.P. did not like the Atlantic City High School and told his mother, Joan Peterson, that he wanted to drop out of school.

Thereafter, in January 1986, Joan Peterson asserted that she and T.P. moved from Longport Ocean Plaza to her daughter's house in Northfield. Peterson's daughter, Joan Merlino, had one child and was pregnant at the time Joan Peterson and T.P. move in to live with the Merlino family. Merlino's husband was employed by one of the hotel/casinos and worked during the nighttime hours. The Merlino home consisted of, among other things, three bedrooms, a livingroom and family room. Joan Peterson testified that the Merlino house was crowded but less so than the Longport Ocean Plaza. T.P. testified that he slept on a cot in his nephew's bedroom. Both Peterson and T.P. testified they did not move all of their personal possessions from the Longport apartment to the Merlino residence.

Joan Peterson asserted that her son, Garrett Turnbull, had purchased a building lot in Linwood with the intention of constructing a house in which Peterson, T.P.

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and Turnbull were to live. Peterson stated that her move to the Merlino home in Northfield was temporarily with no intention to stay with her daughter permanently. Peterson stated that she believed that the Linwood house was to be completed by April 1986.

Joan Peterson testified that she had enrolled T.P. in the Mainland Regional High School asserting that she wanted her son to attend the school in the community to which she and he would be moving. She contended that a Mr. Heller, guidance counselor, registered T.P. and that he suggested that Joan Merlino would have to execute an affidavit of Peterson's and T.P.'s testimony residence. Joan Peterson asserted that Joan Merlino issued the affidavit (Exhibit P-7) and that the affidavit was acceptable to Mr. Heller.

Joan Peterson and T.P. both admitted that they frequently returned to the Longport apartment. Peterson stated that they would stay at the Ocean Plaza when Joan Merlino's husband was not required to work in order to give the Merlino couple privacy. She asserted that after January 30, 1986, she and T.P. would stay at the Longport apartment up to three nights per week. Peterson contended, however, that T.P. would stay at the Merlino home more than 75 percent of the time after January 30, 1986. During the summer months, Peterson asserted that she and T.P. would stay at the Longport apartment four to five nights per week.

Joan Peterson admitted that she received her mail at the Longport address after January 30, 1986 and that her drivers license indicated the Longport address.

Joan Peterson contended that she moved in to Turnbull's newly constructed house in Linwood sometime in April 1987. She asserted that she moved from the Turnbull house on November 1, 1987 and now lives in an apartment in Somer Point, New Jersey.

Joan Merlino testified, among other things, that her mother and brother moved into her home in January 1986. She admitted that it was crowded and that Joan Peterson and T.P. could not move all of their possessions because of the lack of space. Joan Merlino testified that Peterson and T.P. did not stay at the Merlino home every night, however, it was more than 50 percent of the time. When Peterson and T.P. did not stay at the Merlino home, the two would visit and stay with Turnbull at the Longport apartment.

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Joan Merlino admitted that she executed the affidavit attesting to the fact that Joan Peterson and T.P. were residing at the Merlino home until the completion of the Linwood home (Exhibit P-7). Merlino testified that she was not aware that the affidavit was necessary. She asserted that the affidavit was prepared by Joan Peterson who told Joan Merlino that it was needed in order for T.P. to attend the Mainland Regional High School.

FINDINGS OF FACT

Having now reviewed and considered the testimony of the parties and having given fair weight thereto and having observed the demeanor of the witnesses and assessed their credibility, I **FIND** the following facts.

While residing with his mother, Joan Peterson, and his brother, Garrett Turnbull, at the Longport Ocean Plaza, T.P. was eligible to be enrolled as a sending ninth grade pupil in the receiving Atlantic City High School in September 1985. T.P. was not enrolled in the Atlantic City school system at that time but, rather, he began his high school education as a tuition pupil at the Holy Spirit High School, Absecon, New Jersey. T.P.'s educational experience at Holy Spirit was not successful where he earned one P (pass), two D's and three F's (failure) from September 4, 1985 until November 22, 1985 when he withdrew from the school (Exhibit P-3). Thereafter, on a date not certain, T.P. was enrolled in the ninth grade of Atlantic City High School until he withdrew on or about January 30 or 31, 1986 (Exhibit P-4). During this brief stay at Atlantic City High School, T.P. advise his mother that he wished to drop out of school while earning five F's (failure) and zero credits.

Joan Peterson moved into unit 306, Longport Ocean Plaza, in or about March 1983 under a lease arrangement which expired April 1, 1987. Peterson has lived at the known premises at all pertinent times except for a period of approximately eleven months in 1984 where she lived in the State of California. During the beginning of the 1985-86 school year, Joan Peterson resided at the Longport Ocean Plaza with her two sons, Garrett Turnbull and T.P. Garrett Turnbull, a buildin contractor, had purchased a building lot in the Fisher Woods section of the City of Linwood with the intention of constructing a house thereon. The herein record is devoid of any indication as to when the property was

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purchased, when Turnbull commenced construction and/or when Turnbull anticipated the building construction to be completed. The record does disclose that Joan Peterson testified she believed the house construction was to be completed in April 1986. The record does disclose that the construction was completed on or before April 1987.

On or about January 29, 1986, Joan Peterson registered T.P. in the Board's high school. Prior thereto, on January 22, 1986, Peterson had Joan Merlino execute a affidavit prepared by Peterson wherein Merlino at the Merlino swore that Peterson and T.P. were temporarily residing at the Merlino residence (Exhibit P-7). The affidavit was presented to and accepted by the Board's agents.

The record demonstrates that Joan Peterson and T.P. resided at the Merlino Northfield home more than 50 percent of their time from January 30, 1986 through April 1, 1987. Thus, mother and son spent frequent amounts of time, but less than 50 percent at unit 306, Longport Ocean Plaza, during the period January 30, 1986 to April 1, 1987. During the same period, neither Joan Peterson nor T.P. removed all of their possessions from the Longport apartment and move them to the Merlino Northfield residence.

Joan Peterson received her mail at the Longport address until on or about April 15, 1987 when she executed a Change of Address Order for the Margate Branch of the United States Postal Service (Exhibit P-5). Joan Peterson's driver license, issued by the New Jersey Division of Motor Vehicles, listed the Longport address rather than the Merlino Northfield address during the period pertinent.

DISCUSSION AND CONCLUSIONS

The arguments of the parties, by way of posthearing memoranda, is not set forth in full herein but, rather, may fairly be summarized as to their main thrust as follows:

The petitioner Board contends that neither Joan Peterson nor her son, T.P. were domiciled within the school district from January 30, 1986 through April 1, 1987 and, therefore, T.P. was not eligible for a tuition free public education at the expense of the taxpayer within the Regional School District. N.J.S.A. 18A:38-1(a).

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The respondents concede that neither Joan Peterson nor T.P. were domiciled within the Board's jurisdiction during the controverted period of time but, rather, they were residing therein temporarily as provided by N.J.S.A. 18A:38-1(d).

The applicable provisions of the controlling statute is as follows:

> N.J.S.A. 18A:38-1 Attendance at school free of charge
>
> Public schools shall be free to the following persons over five and under 20 years of age:
>
> (a) Any person who is domiciled within the school district;
>
> x x x
>
> (d) Any person whose parents or guardian, even through not domiciled within the district, is residing temporarily therein, but any person who has had or shall have his all-year-round dwelling place within the district for one year or longer shall be deemed to be domiciled within the district for the purposes of this section.

At this juncture it is noted and I so **CONCLUDE** that the instant matter is not concerned with the issue of the so-called "affidavit pupil" under subsection (b) of N.J.S.A. 18A:38-1. However, to the extent that subsection (b) imposes the burden of proof upon the respondents, that portion of the statute remains as an affirmative obligation where it says, in part, that: "... the resident shall have the burden of proving by a preponderance of the evidence ... that [T.P.] is eligible for a free education ...."

The Board focuses its argument on the definition of "domicile" and the principles of law with regard thereton.

> Citizens Bank and Trust Co. v. Glaser, 70 N.J. 72 (1976); In re Dorrance, 115 N.J. Eq. 268 (1934). aff'd 13 N.J. Misc. 168 (1935). Black's Law Dictionary (5th Ed.,1979) defines domicile as:
>
> That place where a man has his true, fixed and permanent home and principal establishment and to which whenever he is absent he has the intention of returning. (Citation omitted) The permanent residence of a person or the place to which he intends to return even though he may actually reside elsewhere. A person may have more than one resident but only one domicile. The legal domicile of a person is important since it, rather than the actual residence,

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> often controls the jurisdiction of the taxing authorities and determines where a person may exercise the privilege of voting and other legal rights and privileges. The established, fixed, permanent, or ordinary dwellingplace or place of residence of a person, as distinguished from his temporary and transient, thought actual, place of residence. It is his legal residence, as distinguished from his temporary place of abode; or his home, as distinguished from a place to which business or pleasure may temporarily call him. See also **Residence.** (Id. at 435)

The facts of this matter clearly demonstrate that respondent Peterson and T.P. were not domiciled within the Board's school district from January 29, 1986, to April 1, 1987. The testimony of the Board's witnesses, the documentation by way of exhibits in evidence and the admissions of Peterson and T.P. on this record shows that respondent Peterson and T.P. frequently returned to their domicile and residence at Longport Ocean Plaza. Peterson's and T.P.'s frequent return, coupled with the fact that they did not remove their possessions from the Longport apartment, supports the Board's contention that neither Peterson nor T.P. were domiciled at the Merlino household in Northfield, New Jersey.

The other indicia which demonstrates that Peterson was not domiciled within the Board's jurisdiction include, but not limited to, Peterson's mailing address and driver license address as the Longport Ocean Plaza address. The herein facts clearly shows that respondent Peterson did not execute a Change of Address Order with the Unites States Postal Service until April 15, 1987, some fifteen months subsequent to her move to the Northfield residence of her daughter.

Respodent Peterson contends that the Board is obligated to provide T.P. with a free public education if T.P.'s parent was residing with her daughter, Joan Merlino, even if that residence was temporary. Respondent relies upon the language as set forth in N.J.S.A. 18A:38-1 subsection (d) where it states:

> Any person whose parent or guardian, even though not domiciled within the district, is residing temporarily therein ...

Respondent asserts that the motivation for Peterson and T.P. to move from the Longport apartment to the Joan Merlino Northfield residence was for the reason that Peterson's son, Garrett Turnbull, intended to build a new home in Linwood, New Jersey for

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Peterson, T.P. and Turnbull. The facts reveal that the construction of the house took a year longer then Peterson had anticipated. The facts further reveal that Peterson and, presumably, T.P. only lived in the Turnbull house for less than a year subsequent to its completion, from April 1987 to November 1987.

The facts already demonstrate, without contradiction, that T.P. was in academic difficulty during this brief enrollment at Holy Spirit High School for his initial ninth grade experience from September 4 to November 22, 1985. The record does not disclose whether T.P. left Holy Spirit voluntarily or involuntarily T.P.'s subsequent enrollment in the Atlantic City High School produced even worse academic results with failures in all subject matter areas from November 1985 through January 1986. During that brief enrollment, T.P. was absent from school fifteen days or three quarters of a month (Exhibit P-4). In addition, while enrolled in Atlantic City High School T.P. asserted to his mother that he wished to drop out of school.

For respondent Peterson to suggest, given these facts, that her reason to move into the Merlino Northfield house was because her son Turnbull was to build a house in Linwood stretches credulity. The obvious motivation for Peterson to temporarily move into the Northfield home of her daughter was T.P.'s poor academic performance the first one-half of the 1985-86 school year and to avoid paying tuition to the Board for T.P.'s public education while she maintained her domicile in Longport. This does not comport with the legislative intent of the statute, N.J.S.A. 18A:38-1.

I **CONCLUDE** that respondent Joan Peterson has not carried her burden of proof to affirmatively demonstrate that she established a temporary residence within the Mainland Regional High School District between the period January 30, 1986 to April 1, 1987. At best, Peterson established temporary sleeping quarters in the school district for herself and her son T.P. but not temporary residence.

I **CONCLUDE,** therefore, that T.P. was a tuition pupil with the Board for the period January 30, 1986 to April 1987 and, pursuant to the stipulation, is liable to pay the sum of $5,534.64 to the Board.

I finally **CONCLUDE** that respondent Joan Peterson and Joan Merlino are held jointly liable for the payment to the Board the sum of $5,534.64.

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ORDER

Accordingly, it is hereby **ORDERED** that respondents Joan Peterson and Joan Merlino forward the sum of $5,534.64 to the Board of Education of the Mainland Regional High School District on or before September 1, 1988 in satisfaction for T.P.'s tuition for the period of January 30, 1986 to April 1, 1987.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

23 May 1988
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

23 May 1988
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAY 26 1988
DATE

OFFICE OF ADMINISTRATIVE LAW

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BOARD OF EDUCATION OF THE MAINLAND REGIONAL HIGH SCHOOL DISTRICT, ATLANTIC COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
JOAN PETERSON AND JOAN MERLINO,	:	
RESPONDENTS.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner excepts to the findings of fact reached by the ALJ but proposes no specific findings in lieu of, or in addition to, those reached by him, nor are supporting reasons provided. N.J.A.C. 1:1-18.4(b)

Upon review of the record, the Commissioner concurs with the findings and conclusions of the ALJ and adopts them as his own with the exception of the conclusion that there is joint liability for tuition payment by respondents. The responsibility for payment of T.P.'s tuition to the Mainland Regional Board rests with his mother. The Commissioner knows of no authority upon which he may assign financial responsibility for tuition to any person in this matter other than the custodial parent because, as noted by the ALJ, this is not a matter dealing with an "affidavit" student pursuant to N.J.S.A. 18A:38-1(b) and (c). Rather, it requires a determination as to whether T.P.'s mother as legal guardian and custodial parent was temporarily residing in the Mainland Regional High School District, thus, entitling T.P. to a free education in accordance with N.J.S.A. 18A:38-1(d). At best, what is demonstrated in this matter is an intermittent sleeping arrangement not a bona fide temporary residence.

Accordingly, the initial decision is adopted except that Respondent Joan Peterson is ordered to pay to the Board the sum of $5,534.64 by September 1, 1988 in satisfaction of T.P.'s tuition for the period January 30, 1986 to April 1, 1987.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

July 6, 1988

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NOS. EDU 2595-88 & EDU 2906-88
AGENCY DKT. NOS. 59-4/88 & 91-4/88

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE BOROUGH OF FLORHAM PARK, MORRIS COUNTY

Frederick W. Haeussler, petitioner, *pro se*
Leslie E. Gentile, petitioner, *pro se*
Linda Zoppi, petitioner, *pro se*
William D. Cullinan, Jr., petitioner and candidate, *pro se*

Robert Tosti, Esq., for respondent Board of Education
(Rand & Algeier, attorneys)

Martin L. Green, candidate, *pro se*
Mary Eleanor Urso, candidate, *pro se*

Record Closed: May 3, 1988 Decided: May 20, 1988

BEFORE KEN R. SPRINGER, ALJ:

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Statement of the Case

This is an inquiry conducted pursuant to *N.J.S.A.* 18A:14-63.12 into the recent school election for the Florham Park school district. The election was held on April 5, 1988. Four groups of petitioners filed separate requests with the Commissioner of Education ("Commissioner") for an inquiry into alleged violations of procedures prescribed by statute. Much of the problem allegedly was caused by widespread voter confusion over the correct method of casting a write-in vote. Basically, the inquiry raises two legal issues: first, whether or not the alleged violations occurred; second, and equally important, whether any violations which may have occurred affected the outcome of the election.

Procedural History

On April 11, 1988, petitioner Frederick W. Haeussler filed a petition signed by 17 qualified voters, including himself, with the Commissioner. The petition alleged "many complaints of machine malfunction and erroneous information given to voters." Within two days, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for hearing as a contested case under Docket No. EDU 2595-88. OAL held an expedited hearing on April 19, 1988 at the Florham Park Municipal Building. Although respondent Board of Education of Florham Park ("Board") was present at this proceeding, it took no position on whether the Commissioner should grant any relief.

Meanwhile, other persons independently filed similar requests with the Commissioner for an inquiry into the election procedures. On April 12, 1988, petitioner Leslie E. Gentile filed a petition signed by 11 voters. That same date, petitioner Linda Zoppi filed a petition with 19 signatures and petitioner William D. Cullinan Jr. filed a petition with 11 signatures. Subsequently, on April 22, 1988, the Commissioner referred these additional petitions to the OAL, where the new case was designated Docket No. EDU 2906-88 and consolidated with the prior matter. Proceedings commenced two weeks earlier were reopened and OAL held a further hearing in Florham Park on May 3, 1988. Evidence at the second hearing included a public opening of the sealed ballots to determine if the election results would have been any different if discarded write-in votes had been counted. At the conclusion of the hearing, the record closed on May 3, 1988.

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Findings of Fact

A. General Background Facts

Polls for the Florham Park school election opened on April 5, 1988 at 3:00 p.m. and closed at 9:00 p.m. The polling place was Ridgedale School. Four voting machines were used. Voters had the choice of two candidates for membership on the school board and either approval or disapproval of the school budget. Total number of ballots cast, including absentee ballots, amounted to 801. An official tally certified by the Board secretary shows that the winning candidates were Martin L. Green with 404 votes and Mary Eleanor Urso with 374 votes. These were the only persons whose names appeared on the ballot. A surprisingly large number of voters cast their ballots for write-in candidates. William D. Cullinan Jr. received 199 votes and Marydiane Russo 178 votes. The budget question was subdivided into current expense and capital outlay. Current expense lost by 382 to 334, a difference of 48 votes. Capital outlay passed by 372 to 360, a margin of 11 votes.

Most of the criticism surrounding the election centered on problems encountered by voters seeking to cast write-in ballots. As noted by Sylvia Kopia, a local election judge, the Borough was "handed a hot coal" by the sudden emergence of a write-in campaign just five days before the election, which period of time happened to coincide with the Easter and Passover weekend. Local officials were unfamiliar with the procedures for write-in voting and had little time to learn. To make matters worse, written instructions supplied by the Office of the County Superintendent of Elections were confusing to many voters. This combination of circumstances led to what some observers have described as a "disorganized atmosphere" at the polls. At the outset, it is important to emphasize that nobody has made any charges of fraud or intentional wrongdoing. Whatever irregularities occurred were undoubtedly the product of honest mistake and inexperience.

Before examining the alleged improprieties, it is helpful to gain a clear understanding of the correct method for casting a write-in vote. Frank Ruggiero, manager of the Morris County voting machine warehouse, testified that the particular machines had room for 50 lines. He and his staff had programmed the machines for "three cycles of two lines each." Lines 1 and 2 were reserved for the candidates running for the two vacancies on the Board. Lines 3 and 4 were reserved

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for the current expense item of budget, on which voters could select yes or no. Lines 5 and 6 were reserved for the capital outlay item of the budget, on which voters could also select yes or no. Remaining lines 7 through 50 were not in use. In order to cast a write-in ballot, a voter must activate the "tension spring" located alongside lines 13 and 14; uncover the appropriate write-in slot by manually moving the metal slide on the left side of the machine; and then write the name on the blank paper appearing in the slot or window adjacent to lines 1 and 2, only one name per line. Write-in votes for a candidate would not be counted unless made on line 1 or 2.

Several witnesses complained about the lack of adequate information on how to cast a write-in vote. Election judge Kopia explained that written instructions were posted at two locations at the polling place. One set of instructions was taped to the table where voters signed the signature books. A few loose copies of the same instruction sheet were placed on another table near the map of the voting districts, but apparently these copies quickly disappeared as voters removed them. These written instructions included the hand-printed message: "VOTE ALL OTHERS FIRST. OK FOR WRITE-IN." Inside the voting booths was a somewhat different set of instructions , including the message: "VOTE ALL OTHER CANDIDATES FIRST." This last instruction sheet was placed in an inconveniently high location, making it difficult for some voters to read.

More than one person was understandably confused by the ambiguous nature of these instructions. According to the voting machine technician Ruggiero, the purpose of the language is to communicate the idea that voters should vote for the names and questions on the printed ballot first and then vote for any personal choice candidates. The reason for this particular order is that the voter cannot change his mind after exposing the write-in slot (because the lever for the ballot choices on that line will automatically lock). However, the order of voting does not affect the validity of any vote. Many voters reasonably interpreted the language to mean the opposite of what was intended. They voted for their write-in "candidate" first, before voting on the budget questions. And if, by chance, they mistakenly wrote their candidate's name in the slots adjacent to lines 3 or 4, they were then precluded from voting for the current expense budget, since the machine treated them as trying to vote twice for the budget.

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Many of the problems in this election could easily have been avoided if County officials responsible for preparing the machines had programmed them so that only the write-in slots next to lines 1 and 2 could be opened. Of course, this does not necessarily mean that petitioners have successfully met their heavy burden of proving that the outcome of the election was adversely affected. As shall be seen, the evidence amply demonstrates that the final election results would remain unchanged even if all invalid write-in votes were counted.

B. Alleged Irregularities in Voting Procedures

(1) Two Names Written in the Same Slot

One common voter error was to write the names of both write-in candidates on the same line, typically line I. In that event, neither vote would be counted as valid. Otherwise, the voter could vote again on line 2, and thus potentially vote more than once for the same candidate or vote for more than two candidates. Physical arrangement of the slots on the machine facilitated, if not invited, this error. The first write-in slot was noticeably larger than the slots beneath it, causing many people to assume wrongly that the extra space was provided for more than one name. Actually, the first slot is larger for use in presidential contests to accommodate the names of a candidate's electors. Many people were justifiably confused by the size of the first slot. For example, Mildred Strohl testified that she wrote two names in the first slot because "it seemed so large." So too, did Leslie Gentile, who had trouble moving the second slide and was incorrectly advised by an unidentified election worker that it was acceptable to put both names in a single slot.

Numerous voters submitted letters indicating that they had committed the same mistake, including Mary Lou McManus (poll watcher told her to slide back the first slot and write the names of her two candidates there); Chara Haeussler (since the first box was twice the size of the rest and parallel to the candidates' names on the printed ballot, she "figured the box was intended for writing in two names."); Edward S. Bromage ("pen in hand, [he] dutifully wrote both names in the double wide slot on the top of the left hand column."); Anthony Blasi (he "voted for the two write-in candidates on one line."); Katherine Rasati (she "wrote both candidates' names in the top slot because it was a double slot and covered the same

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area as both candidates' names on the ballot."); and Philomena Sodano (she followed oral instructions to write in her vote on "the very first slot on the top of the list of candidates").

I FIND that proofs show at some people were deprived of an opportunity to vote for the candidates of their choice because they were misled by the large size of the first slot or misinformed by election workers who encouraged them to write two names in one slot. Workers at the polling place failed to dispel the confusion or offer clear instructions on the proper way to cast a write-in vote.

(2) Names Written on Wrong Line

Another frequent voter error was writing in a candidate's name on the wrong line, that is, any line other than lines 1 or 2. A number of voters wrote the names of candidates in the slots adjacent to lines 13 and 14, presumably because the release mechanism for the slides was located nearby. Indeed, Kopia admitted that one of her own workers improperly instructed voters to put write-in votes on lines 13 and 14, until Kopia corrected the worker's misunderstanding. Other voters wrote candidates' names on the slots next to lines 3 or 4, thereby jamming the levers for the ballot questions. No one testified at the hearing that they had voted on the wrong line. However, the record contains letters from various persons who made this mistake. Illustratively, Elizabeth B. Doyle wrote that the only slots she "was able to open to do the write-in votes were #13 & #14." Similarly, Bernice Manning wrote that she"recorded her ballots on lines thirteen and fourteen." Mary Jane Zeien wrote that her husband had put his write-in votes on lines 13 and 14. Although such evidence is mere hearsay, its trustworthiness is independently corroborated by the fact that various write-in votes were discarded for having been written in the wrong place.

I FIND that some voters cast invalid ballots by writing the names on the wrong line. At least one election worker incorrectly advised voters that write-in votes should be put on lines 13 and 14.

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(3) Machine Malfunction

Few people reported any mechanical difficulties with the machines. When he entered the voting booth and closed the curtain, Frederick W. Haeussler noticed that all 50 write-in slots were already open. Nonetheless, he did not bring this defect to the attention of election officials at the time. At the hearing, County expert Frank Ruggiero contended it was "impossible" for the machine to function in the manner described. Instead, Ruggiero insisted that a properly working machine would automatically close all slots when a voter opens the curtain to exit the booth. No one else gave testimony about experiencing the same problem. (There are unverified allegations that the slots on lines 13 and 14 may have been open when some voters entered the booth, but the record is devoid of any proofs to that effect). In any event, Mr. Haeussler did not have any difficulty voting for the candidates and issues of his choice. As he left the booth, the slots automatically closed behind him. Therefore, any problem he may have encountered did not interfere with his ability to vote.

Elizabeth Haeussler, wife of Frederick Haeussler, did not observe any open slots when she entered the voting booth. Mrs. Haeussler complained that the levers dealing with the budget question "went down but didn't click." Unlike her husband, the slots did not close when she exited the booth. She too did not notify the election officials, because "it didn't occur to [her] it was a possible malfunction" until much later.

A handful of letters contain suggestions of possible machine malfunction. Ellen Limone successfully voted on the budget, but was unable to cast a write-in vote. She tried to push the release lever to the right, but "nothing happened." Because "the lever went back and forth so easily," she assumed that something was wrong with the machine. In frustration, she wrote her candidates' names "on the metal on the extreme left" even though she "had a feeling this could not count." Likewise, Carole K. Pedrazzi had no problem voting for the budget, but could not activate the release lever for the write-in vote. Ms. Pedrazzi also indicated that the lever "just moved back and forth easily as though it was broken." Both voters were apparently under the mistaken impression that the release lever would open the slide covering the write-in slot. Correct operation of the machine requires a manual movement of

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the slide after the release lever has been engaged. Neither writer mentioned that any attempt to push back the slide covering the slot. Accordingly, the difficulties outlined in these letters should be attributed to voter error rather than machine malfunction.

Significantly, nobody complained to the County authorities about machine malfunction on the night of the election . Not until after the votes were all counted did anyone suggest that the machines might not have been functioning properly.

I FIND a lack of credible evidence to support the charges of machine malfunction. Mr. and Mrs. Haeussler were the only witnesses to testify about possible machine malfunction. Even if one credits Mr. Haeussler's testimony, the malfunction would not have effected the outcome of the election. Moreover, if the machine had been broken as Mr. Haeussler's version implies, it is unlikely that others would not also have complained. Mrs. Haeussler, on the other hand, had no trouble casting her vote. Her belated suspicion that her vote might not have counted is sheer speculation, unsubstantiated by adequate proof. She herself admits it was only an afterthought, which didn't occur to her at the time of voting. Hearsay evidence contained in letters is equally unpersuasive. It simply shows that voters had difficulty understanding the instructions for write-in voting, not that the machines were defective.

(4) Use of Pen for Write-In Voting

False rumors spread among the public that a write-in ballot would not be counted if written in ink rather than pencil. Consequently, several voters expressed concern that they had been disenfranchised because they had used a pen to write in a candidate's name. Election official Kopia put these fears to rest by explaining that she had counted write-in votes regardless of whether written by pen or pencil.

I FIND that write-in votes in pen as well as pencil were counted in tallying the votes.

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(5) Locking of Lever on Budget Question

In view of the closeness of the results, the most disturbing allegations involve the inability of some voters to vote on the school budget. As described by Ms. Kopia, voters who voted first for the budget and then for a write-in candidate had no difficulty. But some voters who voted first for a write-in candidate then discovered that the levers for the current expense question (lines 3 and 4) had "locked" and would not budge. She knew of about half a dozen voters who had complained to her of this problem on the night of the election. Over the next few days, two to three dozen more voters contacted her with varying complaints. including this particular problem.

Many who testified had no trouble with locked levers. Mr. Haeussler, for example, was able to depress the levers for both budget questions. His wife also admitted that the budget levers "went down" when she voted. Mildred Strohl said she didn't have any problem moving the levers for either the current expense or capital budget. Only one witnesses had personally experienced levers which would not move. Annette Marucci, who had opened the slots on each of the first four lines, was unable to vote for the current expense budget.

In addition, several letter writers told of being unable to move the budget lever. Mrs. Mary Jane Zeien tried to vote on the current expense budget after casting a write-in vote, but the "lever would not move." Having used the write-in slots, Nadine Warren DeAngelis "was unable to depress the lever to vote for the current expense portion of the school budget." Eleanor Ackerman found that "[a]fter writing in two votes for candidates, the top lever for the budget questions would no go down completely."

Expert witness Frank Ruggiero explained the automatic lock mechanism built into voting machines. Voters who first wrote the name of a candidate on lines 1 or 2 would still be able to vote on the budget by depressing the appropriate levers on lines 3 or 4 for current expense and on lines 5 or 6 for capital outlay. If, however, the voter mistakenly tried to cast a write-in vote on line 3 or 4, the machine would automatically lock to prevent anyone from casting both a regular and a write-in vote. In that event, the voter would be unable to vote yes or no on the current expense question. The same is true for a write-in vote on line 4 or 5, which would

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prevent a yes or no vote for the capital outlay question. This is not a malfunction, but an intended operation designed to safeguard against one person voting twice for the same candidate or question. Further, Ruggiero gave his assurance that any attempt to write in on lines 7 through 50 would have no effect on the voter's ability to vote for the budget cycles. In short, only voters who tried to cast a write-in vote on lines 3 through 6 would be unable to vote for the budget.

Nothing on the record is inconsistent with Mr. Ruggiero's account. Except for Ms. Marucci who did open slots 3 and 4, the evidence does not reveal what exact lines were used by others unable to vote for the budget. Given the fact that a number of write-in voters were in fact able to vote on the budget questions, the most plausible explanation is that those who could not were the same ones who voted for write-in candidates on lines 3 or 4.

I FIND that those voters who tried to vote for write-in candidates on lines 3 or 4 were locked out of expressing any preference on the current expense budget question.

C. Effect on the Outcome of the Election

As noted, the central question is not whether any voting violations may have occurred, but whether such violations as did occur affected the outcome of the election. Disposition of this issue turns on whether there were enough invalid write-in votes or persons deprived of the opportunity to vote on the budget to make any actual difference in the ultimate results.

After the election was over, the paper rolls from the machines were placed in sealed boxes and delivered by the local board secretary into the custody of the County Superintendent's Office for safekeeping. During the hearing, the County Superintendent's Office produced those boxes, which were unsealed in full view of the public. With the assistance of county school business administrator Shirley M.Clement and borough clerk Joyce Rowson, election official Sylvia Kopia publicly counted all the write-in ballots which had originally been discarded for whatever reason. Totals amounted to 98 invalid votes for Cullinan and 106 invalid votes for for Russo. Even if all invalid write-in votes are added to the total of valid votes received by the write in candidates, the highest number of votes received by a write-in

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candidate (199 plus 98 = 297 for Cullinan) would still be 77 less than the lowest number of votes received by a candidate on the regular ballot (374 for Urso).

The tally of the discarded write-in votes included a tabulation of the number of voters who tried to vote on lines 3, 4, 5, or 6 and, by virtue of the automatic locking mechanism, were prevented from voting on the budget issues. Cullinan received 9 write-in votes and and Russo received 11 write-in votes on line 3. No write-in votes at all were written on lines 4 through 6. On the generous assumption that the persons who voted for Cullinan were not the same persons who voted for Russo, a maximum of 20 voters wrote in a candidate's name on line 3. Again, the total is insufficient to make any difference on the current expense budget question, which failed passage by 48 votes.

I FIND that any voting irregularities did not affect the outcome of the election.

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Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the proofs are insufficient to justify overturning the election results.

N.J.S.A. 18A:14-63.12 provides that, upon written request of a candidate or 10 qualified voters, the Commissioner or his authorized representative "shall inquire into alleged violations of statutorily prescribed procedures for school elections, to determine if such violations occurred and if they affected the outcome of the election." When a vacancy on a school board arises "due to improper election procedures," the Commissioner may order a special election to be held within 60 days of the improper regular election. *N.J.S.A.* 18A:12-15(d).

Absent malconduct or fraud, a concluded election will not be overturned for an irregularity in the ballot "unless in all human likelihood the irregularity has interfered with the full and free expression of the popular will and thus influenced the result of the election." *In re Hackensack Recall Election*, 31 *N.J.* 592, 595 (1960); *Wene v. Meyner*, 13 *N.J.* 185, 196 (1953). Mere irregularities involving compliance with the provisions of the election laws, although sufficient to challenge the right to vote at the polls, are not sufficient to set aside an election. *In re Petition of Hartnett*, 163 *N.J.* Super. 257, 265 fn. 3 (App. Div. 1978). Generally, the Commissioner will refuse to set aside an election unless it is clearly demonstrated that the will of the electorate has been thwarted. *In re Annual Sch. Elec. Held in the Greater Egg Harbor Reg. Sch. Dist.*, 1978 *S.L.D.* 11, 20 (Comm'r 1978).

Initially, the threshold legal issue is whether there have been any violations of the "statutorily prescribed procedures for school elections." Since the invalid ballots are largely attributable to voter error, the successful candidates argue that each voter had a civic duty of informing oneself of the proper procedures for write-in voting before entering the polling booth and that.no statutory violations of the election law have occurred. Voting machines must be prepared and used in school elections in the same manner as they are used in elections held pursuant to Title 19, the General Election Law. *N.J.S.A.* 18A: 14-42. Write-in ballots, referred to as "irregular ballots" in the statute, "must be cast in [their] appropriate place on the machine, or [they] shall be void and not counted." *N.J.S.A.* 19:49-5. Hence, it was

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no violation of law for local election officials to refuse to count multiple votes erroneously written in the same slot or write-in votes erroneously written on the wrong lines. *In re Annual Sch. Elec. Held in the Matawan-Aberdeen Reg. Sch. Dist.*, No. 116-87, slip op. at 3 (Comm'r May 19, 1987); *In re Annual Sch. Elec. Held in Hillsborough Twp.*, 1965 *S.L.D.* 74 (Comm'r 1974).

On the other hand, citizens are entitled to clear and understandable instructions on how to perform their civic duty. Such a requirement can be implied from a series of interrelated statutes. County officials have an obligation to train new local election officers in the proper use of the machine and in their duties. *N.J.S.A.* 19:50-1. Sample or instruction ballots must be mailed to registered voters and posted at the polling place. *N.J.S.A.* 19:49-4. As far as practicable, County officials must furnish a mechanical model of the voting machine for the polling place. *N.J.S.A.* 19:50-3. "[E]ach voter shall, before entering the machine, be instructed regarding the operation of the machine and the instruction illustrated on the model[.]" *Ibid.* Undoubtedly, this requirement was not fulfilled in the present instance. Voters have a reasonable expectation that they can rely on instructions from election officials on proper operation of the machines. See *In re Annual Sch. Elec. Held in Helmetta Sch. Dist.*, 1977 *S.L.D.* 695 (Comm'r 1977), wherein the Commissioner found that election officials gave improper instructions to voters during and before the election. Evidence in this case shows that local election workers were themselves not fully familiar with the write-in process. Instructions supplied by the County were misleading and ambiguous. Admittedly, local workers unintentionally misinformed voters on what place to put the names of write-in candidates. No criticism is hereby intended of the honest and hard-working local officials, who did their best under trying circumstances. Title 19 in many places is confusing, to say the least, even to those trained in legal interpretation, lawyers and judges alike. *In re Klayman*, 97 *N.J. Super.* 295, 301 (Law Div. 1967). To the extent, however, that this atmosphere of confusion contributed to misunderstanding by the electorate, it may be said that the statutory procedures for a school election were indeed violated. At any rate, it is sufficient to permit an examination of whether the election results were adversely affected.

Unfortunately, mass confusion in write-in contests appears to be the rule rather than the exception. *In re Annual Sch. Elec. Held in Hillsborough Twp*, 1965 *S.L.D.* at 77. Courts or the Commissioner have set aside the results in close write-in races,

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where, for example, there was a one vote difference between winning and losing candidates, *In re Klayman*, at 305, or where the voting machine was improperly prepared, *In re the Annual Sch. Elec. Held in the Pompton Lakes Sch. Dist.*, 1977 *S.L.D.* 586 (Comm'r 1976), or where the uncertainty with regard to write-in voting was so serious that it tainted the final results, *In re Annual Sch. Elec. Held in Fairfield Twp.*, No. 265-85, slip. op at 45-47 (Comm'r July 29, 1985). Despite "great difficulty" in a write-in campaign, including voter misunderstanding of the lock-out mechanisms and incorrect instructions by election officials, the Commissioner nonetheless has upheld the original election results for lack of any concrete evidence that the will of the people had been suppressed. *In re Annual Sch. Elec. Held in the Matawan-Aberdeen Reg. Sch. Dist.*, OAL Dkt. No. EDU 2590-87, initial decision at 21 (Comm'r of Ed. Oct. 27, 1987).

Where the result of election irregularities "can be ascertained and its effect exscinded, and the true will of the electorate determined, this should be done." *In re Bonsanto's Application*, 171 *N.J. Super.* 356, 361 (App. Div. 1979). Review of the sealed ballots here conclusively establishes that the write-in candidates would still not have won, even if all attempted votes by their supporters are counted. Uncontradicted expert testimony further establishes that only those write-in voters who used line 3 would have been prevented from voting on the current expense budget, a number too small to influence the outcome. Apart from the unwarranted assumption that something must be wrong simply because 85 persons who voted in the election did not vote on the budget issue, petitioners offered no opposing evidence to overcome the inference drawn from the expert testimony. Petitioners have failed to produce sufficient evidence to meet their heavy burden of proving that the will of the electorate has been thwarted.

Order

It is **ORDERED** that the relief demanded by petitioners is denied.

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This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if **Saul Cooperman,** does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **SAUL COOPERMAN** for consideration.

May 20, 1988
DATE

KEN R. SPRINGER, ALJ

MAY 23 1988
MAY 24 1988
DATE

Receipt Acknowledged
DEPARTMENT OF EDUCATION

Mailed to Parties:

May 24, 1988
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
BOROUGH OF FLORHAM PARK, MORRIS	:	DECISION
COUNTY.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed in the matter.

Upon consideration of the record, the Commissioner agrees with the ALJ's findings and conclusions and adopts them as his own. Accordingly, the recommended order denying the requested relief is adopted as the final decision in this matter.

The importance of having appropriate instruction provided to election workers cannot be overemphasized. The Florham Board of Education is reminded of this responsibility and cautioned that it must in the future fulfill its obligation to assure that election workers are given adequate and proper instruction so that the workers in turn may assist citizens in voting procedures.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

July 6, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6924-87
AGENCY DKT. NO. 285-9/87

HELEN YORKE,
Petitioner,
v.
PISCATAWAY TOWNSHIP BOARD OF EDUCATION,
Respondent.

Stephen E. Klausner, Esq., for petitioner (Klausner, Hunter and Oxweld)

David B. Rubin, Esq., for respondent (Rubin, Rubin and Malgran)

Record Closed: April 14, 1988 Decided: May 25, 1988

BEFORE **DANIEL B. MC KEOWN**, ALJ:

Helen Yorke (petitioner), a teacher with a tenure status in the employ of the Piscataway Township Board of Education (Board), challenges an action by which the Board determined to withhold a salary increment from her for the 1987-88 school year. After the Commissioner of Education transferred the matter to the Office of Administrative Law on October 19, 1987 a prehearing conference was conducted by way of conference telephone call on December 4, 1987. During that conference, the matter was scheduled to be heard February 19, 1988. Subsequently, the parties agreed that based on a stipulation of relevant and material fact which they believed could be developed between them, a hearing was not necessary. Accordingly, the matter was scheduled to be adjudicated by way of cross motions for summary decision. The parties arrived at and submitted a stipulation of fact. The record closed April 14, 1988 upon receipt of petitioner's letter memorandum.

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STIPULATED FACTS

The facts of the matter stipulated by the parties are reproduced here in full:

1. Petitioner, Helen Yorke, is a tenured teacher employed by respondent, Piscataway Township Board of Education, as a mathematics instructor since September 1971.

2. On August 22, 1985, respondent voted to withhold petitioner's 1985-86 increment and adjustment [increment]. The Initial Decision which is annexed hereto is on appeal.

3. On April 10, 1986, respondent voted to suspend petitioner without pay and certified tenure charges against her. The Initial Decision dated June 19, 1987, the Commissioner of Education's decision dated August 3, 1987 and the State Board of Education's decision dated December 4, 1987 are all annexed hereto. The State Board decision is on appeal to the Appellate Division.

4. On June 23, 1986, the Board of Education voted to withhold Petitioner's 1986-87 increment and adjustment. (See above cited tenure case decisions.)

5. On June 22, 1987, the Board of Education voted to withhold Petitioner's 1987-88 increment and adjusment for the reasons contained in the annexed letter. [The referenced letter is not "annexed." Nevertheless, it is clear that the referenced letter is a letter dated June 23, 1987 attached to the Petition of Appeal which states that the withholding action was taken "as a result of the pending tenure charge of unbecoming conduct and suspension with pay for the 1986-87 school year period."]

6. Petitioner by virtue of her suspension did not perform any work, labor, or services for Respondent from April 10, 1986, the date of her suspension, until September 1, 1987, the date of her reinstatement.

This concludes a recitation of the facts stipulated by the parties.

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ADDITIONAL BACKGROUND FACTS NOT IN DISPUTE BETWEEN THE PARTIES

The following background facts of the matter, as gleaned from the referenced initial decision in the stipulated facts, and not otherwise in dispute between the parties, are these. This case is directly related to three other separate legal actions between Petitioner and the Board. The disputes began on August 22, 1985 when the Board determined to withhold petitioner's 1985-86 salary increment. She appealed that determination and that matter was pending when on April 10, 1986 the Board determined to certify tenure charges and to simultaneously suspend Petitioner without pay from her employment. At the time, both petitioner and the Board agreed to consolidate the increment withholding litigation with the tenure charge litigation so that both matters could be heard and disposed of simultaneously.

However, on June 23, 1986 before the consolidated actions proceeded to hearing, the Board acted again to withhold petitioner's 1986-87 salary increments from her. Petitioner then filed another legal challenge to that withholding action. Consequently, the actions then pending between the parties were the consolidated 1985-86 salary increments withholding action with the tenure charge action, and the single action of the 1986-87 salary increment withholding. The parties agreed that both salary increment actions should be consolidated for purposes of adjudication, and that the tenure charge matter should be heard alone.

The tenure charge matter received priority and was heard first. The assigned administrative law judge concluded that the Board failed to demonstrate that the conduct petitioner engaged in constituted conduct unbecoming a teaching staff member. He therefore ordered that the tenure charges of unbecoming conduct against petitioner be dismissed with prejudice and that petitioner be immediately reinstated to her teaching position "together with all back pay, benefits, and other emolutments withheld, in part or full, and that she be made whole" (Initial decision, in re: tenure hearing of Helen Yorke, OAL DKT. NO. EDU 3393-86 (June 19, 1987, at p. 17)). The Commissioner of Education disagreed and found that petitioner in that case respondent, engaged in gross carelessness and inefficiency. The Commissioner then ruled as follows:

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Accordingly, the Commissioner determines that respondent is guilty of conduct unbecoming a teacher and levies the following penalties:

1. Loss of salary for the first 120 days of her suspension; and

2. Withholding of any and all salary increments for the 1986-87 school year. Such, the second penalty renders moot the matter pending before the Office of Administrative Law which pertains to the withholding of repondent's 1986-87 increments. (Commissioner of Education decision, Aug. 3. 1987 at p. __.)

The State Board of Education affirmed the decision of the commissioner on December 2, 1987.

The above recited facts stipulated together with the general background facts of the matter not in dispute between the parties I FIND, constitute all relevant and material facts herein.

ISSUE

The issue presented and agreed upon at the prehearing conference in the matter conducted December 4, 1987 is as follows:

> Whether the Board violated NJSA 18A:29-14 regarding its withholding salary increments from petitioner for 1987-88 in the total circumstances to be established at the time of hearing by a preponderance of credible evidence or, alternatively, by way of a stipulation of all relevant and material facts.

LEGAL ANALYSIS

NJSA 18A:29-14 authorizes boards of education to withhold the salary or adjustment increment, or both of teaching staff members for inefficiency or other good cause. A salary increment is a reward for meritorious service given to the member by the board. North Plainfield Educ. Ass'n v. Bd. of Educ., 96 N.J. 587, 595 (1984). A board of education which chooses to exercise its authority to withhold the salary or adjustment increment, or both, of any teaching staff member in its employ must have a reasonable

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basis to do so. The test is whether the facts are as the board believed them to be at the time it took the withholding action. Kopera v. West Orange Bd. of Education, 66 N.J. Super. 288, 295 (App. Div. 1960). A board which has a salary policy providing for salary increments for meritorious service may not act arbitrary, capricious, or unreasonable in its determination to withhold salary increments from teaching staff members.

CONCLUSION

In this case, the Board determined that petitioner did not earn a salary increment during 1986-87 for the 1987-88 school year because she had been suspended on charges. Petitioner argues to the contrary that but for the suspension from her duties by the Board, she would have been able to perform the kind of meritorious service necessary for her to have earned the salary increment for 1987-88. Therefore, petitioner reasons that because the Board did not prove the truth of the charges it filed against her to the extent necessary to cause a termination of employment, the Board acted improperly in causing her to be suspended in the first place and, by extension, may not now use that improper suspension in order to justify its withholding of a salary increment.

Given all of the facts and circumstances in this case, it is clear that the final decision thus far regarding the tenure charge matter does not vindicate petitioner from conduct unbecoming. The Commissioner of Education specifically found that the Board proved the petitioner engaged in conduct unbecoming a teacher. Commissioner also imposed a discipline he determined to be appropriate for that unbecoming conduct. Petitioner was not improperly suspended from her teaching duties during the pendency of the tenure case solely because the discipline imposed upon her was less than termination of employment. Because petitioner was not improperly suspended from her teaching duties during the tenure matter, she was not available through her own conduct to the Board to demonstrate to it that she otherwise would have earned a salary increment for 1987-88. That being so, the action of the Board to withhold petitioner's salary increment for 1987-88 must be affirmed as having been taking within its lawful authority. Petitioner has failed in her burden of pursuasion to establish that the action of the Board to withhold her salary increment for 1987-88 is arbitrary, capricious, unreasonable, or somehow unlawful or contrary to the provisions of NJSA 18A:29-14.

Accordingly, the petition of appeal is dismissed.

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This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

May 25, 1988
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

MAY 26 1988
DATE

Seymour Wiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

MAY 31 1988
DATE

OFFICE OF ADMINISTRATIVE LAW

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HELEN YORKE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon his careful and independent review of the record of this matter, the Commissioner agrees with the finding and the conclusion of the Office of Administrative Law that the action of the Board to withhold petitioner's salary increment for 1987-88 must be affirmed as having been taken within its lawful authority. The Commissioner further finds that petitioner has failed in her burden of persuasion to establish that the action of the Board to withhold her salary increment for the 1987-88 school year is arbitrary, capricious, unreasonable or contrary to the provisions of N.J.S.A. 18A:29-14.

Accordingly, the Commissioner accepts the recommendation of the Office of Administrative Law dismissing the Petition of Appeal

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and adopts it as the final decision in this matter for the reasons expressed in the initial decision.

COMMISSIONER OF EDUCATION

JULY 8, 1988

DATE OF MAILING - JULY 8, 1988

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HELEN YORKE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon his careful and independent review of the record of this matter, the Commissioner agrees with the finding and the conclusion of the Office of Administrative Law that the action of the Board to withhold petitioner's salary increment for 1987-88 must be affirmed as having been taken within its lawful authority. The Commissioner further finds that petitioner has failed in her burden of persuasion to establish that the action of the Board to withhold her salary increment for the 1987-88 school year is arbitrary, capricious, unreasonable or contrary to the provisions of N.J.S.A. 18A:29-14.

Accordingly, the Commissioner accepts the recommendation of the Office of Administrative Law dismissing the Petition of Appeal and adopts it as the final decision in this matter for the reasons expressed in the initial decision.

COMMISSIONER OF EDUCATION

July 8, 1988

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EDU #6924-87
C # 187-88
SB # 39-88

HELEN YORKE,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT-RESPONDENT,	:	

Decided by the Commissioner of Education, July 8, 1988

For the Petitioner-Appellant, Klausner, Hunter & Oxfeld
(Stephen E. Klausner, Esq., of Counsel)

For the Respondent-Respondent, Rubin, Rubin and Malgran
(David B. Rubin, Esq., of Counsel)

Helen Yorke is a tenured mathematics teacher employed by the Piscataway Township Board of Education. In April 1986, the Board certified tenure charges of unbecoming conduct against her and suspended her without pay as provided by N.J.S.A. 18A:6-14. On August 3, 1987, the Commissioner sustained the charges, and, finding that dismissal was not the appropriate penalty, directed that she suffer the loss of salary for the first 120 days of her suspension and loss of increments for the 1986-87 school year. Ms. Yorke appealed that determination to the State Board, and on December 4, 1987, we affirmed the decision of the Commissioner. An appeal from our decision is currently pending before the Appellate Division.

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After the Commissioner's decision was rendered, the Board reinstated Ms. Yorke, thereby ending her suspension, which had been continued to that point as permitted by N.J.S.A. 18A:6-14. As a result of her suspension during the pendency of the tenure proceedings before the Commissioner, Ms. Yorke did not render any services to the Board from April 10, 1986 until September 1987.

Ms. Yorke's compensation upon reinstatement did not include increments for 1987-88, the Board having acted on June 22, 1987, to withhold those increments on the grounds that Ms. Yorke had not provided any services to it while she was suspended so as to have earned any increments. By petition to the Commissioner, Ms. Yorke challenged the Board's action in withholding her increments.

The Administrative Law Judge (ALJ) concluded that Ms. Yorke had failed to show that the Board's action in withholding her increments for 1987-88 was arbitrary, capricious, unreasonable or contrary to N.J.S.A. 18A:29-14. In so concluding, he emphasized that the final decision that has been rendered in the tenure proceedings thus far does not vindicate Ms. Yorke and that her suspension during pendency of the proceedings was not improper. Because her suspension was not improper, it was through her own conduct that Ms. Yorke was not available to demonstrate to the Board that she otherwise would have earned increments for 1987-88.

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

Ms. Yorke appealed, arguing that as a result ... the tenure charges, the Board barred her from performing services for it during 1986-87 and that since she was ready willing and able to perform her

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teaching duties, it is inequitable to permit the Board to withhold increments she would have earned had the Board let her work.

We find no merit to Ms. Yorke's claim. As found by the ALJ, Ms. Yorke's suspension was in no way improper. N.J.S.A. 18A:6-14. As emphasized by the ALJ, Ms. Yorke's suspension was a consequence of her own conduct that led to the certification of the tenure charges against her and thus far those charges have been sustained.

We have consistently held that a respondent to tenure charges has no entitlement to receive a salary amount that includes an award of increments during the period of suspension pursuant to N.J.S.A. 18A:6-14. In the Matter of the Tenure Hearing of John Eberly, decision on motion by the State Board, March 2, 1988; In the Matter of the Tenure Hearing of Anthony Castaldo, decided by the State Board, July 2, 1986. We recognize that a respondent may be entitled to receive increments on the basis of services rendered to the board following reinstatement prior to ultimate disposition of the charges even where the charges are sustained. In the Matter of the Tenure Hearing of Robert E. Doyle, decided by the State Board, June 4, 1986, slip. op. at 8, aff'd in part and remanded, Docket #A-4885-85T5 (App. Div. Nov. 13, 1986), decision on remand by the State Board, Jan. 7, 1987, aff'd, Docket #A-4885-85T5 (App. Div. June 3, 1987), certif. denied, 109 N.J. 55 (1987). However, the fact that Ms. Yorke was reinstated prior to ultimate resolution of her appeal by the Appellate Division in no entitles her to be awarded increments for the period of her suspension during which she rendered no services to the Board. cf. Bd. of Education of Bernards Tp. v. Bernards Tp. Ed. Ass'n. 79 N.J. 311, 321 (1979).

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We find that Ms. Yorke has failed to show that the Board's action was arbitrary, capricious or unreasonable, and, accordingly, we affirm the decision of the Commissioner.

November 1, 1988

Date of mailing 3 NOV 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NOS. EDU 6854-85
and EDU 9-86
AGENCY DKT. NOS. 343-10/85
and 410-12/85 (Consolidated)

IN THE MATTER OF THE TENURE HEARING OF CHRIS A. GERVASIO, SCHOOL DISTRICT OF THE TOWNSHIP OF BORDENTOWN.

Stephen J. Mushinski, Esq., for petitioner, the Bordentown Township Board of Education (Parker, McCay & Criscuolo, attorneys)

Joel S. Selikoff, Esq., for respondent, Chris A. Gervasio (Selikoff & Cohen, attorneys)

Record Closed: May 23, 1988 Decided: May 26, 1988

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

These matters were opened before the Commissioner of Education by the Bordentown Township Board of Education. The Board of Education preferred tenure charges against Chris A. Gervasio, respondent. The matters were transmitted to the Office of Administrative Law, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. The matters were consolidated for disposition.

The respondent was indicted for the same activities that underlie the tenure charges. His tenure hearing was delayed several times as the criminal matter progressed through the court. On June 4, 1987, the respondent was adjudged guilty of theft by failure to make required disposition of property received. A judgment of conviction was entered on April 15, 1988, and is attached to this decision.

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N.J.S.A. 2C:51-2 provides that a person holding any public office, position, or employment, elected or appointed, under any political subdivision of this State, who is convicted of an offense, shall forfeit that office or position if he is convicted of an offense involving dishonesty or if he is convicted of an offense involving or touching his office, position or employment.

I **FIND** and **DETERMINE** that the offense of which the respondent was convicted involved student monies for which he was responsible, and therefore touches upon his public position. Under N.J.S.A. 2C:51-2, no action by any body is required. Forfeiture occurs automatically upon occurrence of one of the stated conditions. O'Halloran v. DeCarlo, 156 N.J. Super. 249, 255 (Law Div. 1978), aff'd 162 N.J. Super. 174 (App. Div. 1978), certif. den. 79 N.J. 469 (1978), cert. den. 442 U.S. 917 (1979).

I **CONCLUDE** that Chris A. Gervasio has forfeited his employment with the Bordentown Township Board of Education. I further **CONCLUDE** that, upon the forfeiture, the tenure charges cease to be justiciable before the Commissioner of Education, and hence before the Office of Administrative Law.

I therefore **ORDER** this matter returned to the Commissioner of Education.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

26 MAY 88
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

MAY 27 1988
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

[redacted] 1 1988
DATE

Mailed To Parties:

OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE TENURE	:	
HEARING OF CHRIS A. GERVASIO,	:	COMMISSIONER OF EDUCATION
BORDENTOWN REGIONAL SCHOOL	:	DECISION
DISTRICT, BURLINGTON COUNTY.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Respondent filed timely exceptions, not to that aspect of this matter concerning the forfeiture of his tenured position pursuant to N.J.S.A. 2C:51-2, but rather to the Administrative Law Judge's December 10, 1986 Order, Decision on Motion, interlocutory review of which was denied by the Commissioner December 24, 1986. The Board's reply exceptions thereto were untimely filed.

Accompanying respondent's request for interlocutory review of the ALJ's December 10, 1986 Order, Decision on Motion were copies of respondent's brief and Motion to Compel Payment of Salary with Interest, which were filed with the Commissioner on December 16, 1986. Said documents form the basis of respondent's current exceptions and are incorporated herein by reference. The basis for respondent's request for review of said Motion was the "Judge's erroneous interpretation of the Board of Education's June 17, 1986 Resolution. The Judge interpreted said Resolution as suspending Respondent by reason of indictment thereby justifying cessation of Respondent's salary as of the date of the Resolution pursuant to N.J.S.A. 18A:6-8.3." (Exceptions, at p. 2)

Respondent avers in exceptions that the Board's June 17, 1986 resolution was not a formal action sufficient to comply with the standard set forth to invoke N.J.S.A. 18A:6-8.3. In this regard, respondent argues:

> ***In fact, the Board passed the Resolution simply as an attempt to stop paying Respondent's salary retroactive to May 22, 198[6]. Moreover, Respondent's suspension by reason of indictment did not occur until August 19, 1986. This is evident by Board Resolutions issued on June 17, July 8, and August 19, 1986 attached to Respondent's Brief as Exhibits B, C, and D, respectively. Respondent relies for his position on the briefs and supporting documents submitted to the Commissioner in his December 17, 1986 Motion for Interlocutory Review, *** copies of which are enclosed herewith. (Exceptions, at p. 2)

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Respondent submits that the Commissioner should reject the ALJ's December 10, 1986 Order, Decision on Motion and direct the Board to pay him his salary through June 30, 1986 with requisite interest.

Upon his careful and independent review of the record before him, the Commissioner adopts as his own the initial decision the ALJ filed in this matter on May 26, 1988 for the reasons stated therein. Thus, respondent forfeits his tenured position pursuant to the applicable provisions of N.J.S.A. 2C:51-2. Further, the Commissioner adopts as his own the Order, Decision on Motion the ALJ filed dated December 10, 1986 in all respects except that he disallows interest to be paid on any salary due and owing respondent. He so directs for the reasons stated below.

The Commissioner concurs with the ALJ's observation in his Order, Decision on Motion dated December 10, 1986 that the two statutes implicated in the salary aspect of this case are N.J.S.A. 18A:6-14 and 6-8.3. Further, the Commissioner concurs with the ALJ that In re Martin, School District of Asbury Park Board of Education, N.J. Superior Court, Appellate Division, July 17, 1985, A-5503-83T6 (unreported) is dispositive in deciding whether the Board, having previously filed tenure charges under N.J.S.A. 18A:6-10 et seq. and having suspended respondent without pay for 120 days, might discontinue payment of such salary after the 120-day period lapses, pursuant to N.J.S.A. 18A:6-8.3, following the issuance of an indictment based on the same facts alleged in the tenure charges. Martin, supra, compels the conclusion that having suspended him originally pursuant to N.J.S.A. 18A:6-10 et seq., the Board could not discontinue his salary on the day respondent was indicted, May 21, 1986, in reliance upon N.J.S.A. 18A:6-8.3, absent Board resolution specifically changing the basis of the suspension to one by reason of his indictment. Martin states:

> Martin challenges the further decision of the State Board that he was not entitled to receive the salary paid to him after he was indicted. He claims that the State Board incorrectly determined under N.J.S.A. 18A:6-8.3 that his right to salary terminated on November 5, 1982, the day of his indictment. N.J.S.A. 18A:6-8.3 provides:
>
> > Any employee or officer of a board of education in this State who is suspended from his employment, office or position, other than by reason of indictment, pending any investigation, hearing or trial or any appeal therefrom, shall receive his full pay or salary during such period of suspension, except that in the event of charges against such employee or

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> officer brought before the board of education or the Commissioner of Education pursuant to law, such suspension may be with or without pay or salary as provided in chapter 6 of which this section is a supplement.

Clearly this statute is applicable to suspensions under the tenure law so that if a person is suspended from his or her employment "by reason of indictment" he will not receive the salary benefits contained in the scheme. The problem is that Martin was not suspended by reason of indictment, he was suspended by reason of his arrest. His indictment did not occur until over ten months after his arrest and no action by the Local Board to suspend him because of the indictment took place at that time. Thus, the statute does not prohibit him from receiving his salary when the indictment was handed down.

Pursuant to the tenure law the Local Board was required to pay him while he was suspended. When he was finally indicted, the Local Board did not act to suspend him by reason of that indictment. His indictment alone could not convert the suspension by reason of arrest into a suspension by reason of indictment when no specific action to that effect was taken by the Board. (emphasis supplied.) (Slip Opinion, at pp. 9-10)

Respondent concedes at page 5 of his Brief in Support of Motion to Compel Payment of Salary with Interest on Behalf of Respondent, Chris Gervasio, that

> [t]he 120 day period following the certification of the charges passed and salary payments during the suspension must be maintained up until the date that the Board took action to change the status of Respondent's suspension to one by reason of his indictment.

The issues in the instant matter thus become whether the Board effectively acted, by formal resolution, to change the status of respondent's suspension to one by reason of his indictment and, if so, when and, further, whether the Board might so suspend salary in conjunction with a suspension from duties by reason of indictment retroactively.

The Commissioner adopts as his own the language contained within the ALJ's Order, Decision on Motion dated December 10, 1986 wherein he states:

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> In the present case, the Board has avoided the problem encountered by the Asbury Park board in Martin by passing the resolution on June 17, 1986 specifically invoking N.J.S.A. 18A:6-8.3. However, nothing in N.J.S.A. 18A:6-8.3 or in the related statute, N.J.S.A. 18A:6-14, suggests that a suspension of salary in conjunction with a suspension from duties by reason of indictment can be made retroactive.
>
> Having considered the circumstances, I DETERMINE that Gervasio is entitled to any monies he received until the Board acted on June 17, 1986, to invoke the indictment exception. Martin, above. I CONCLUDE that the Board properly invoked the indictment exception of N.J.S.A. 18A:6-8.3 in its resolution of June 17, 1986. I also CONCLUDE that Gervasio was entitled to all salary and emoluments up to the effective date of the resolution. (Initial Decision, ante)

His careful review of the three Board resolutions, dated June 17, 1986 (Exhibit B), July 8, 1986 (Exhibit C), and August 19, 1986 (Exhibit D), convinces the Commissioner that notwithstanding the Board's reliance on the ALJ's erroneous directive in his Order dated May 22, 1986 that respondent had requested a delay, thus, allegedly providing a second basis for suspending payment of his salary in conformity with N.J.S.A. 18A:6-10 et seq., the Board in good faith did comply with the procedures set forth in Martin, supra, for ceasing salary payments to respondent following his indictment. See In re McGuire, School District of Haddonfield, decided by the Commissioner October 21, 1985, aff'd State Board February 5, 1986 wherein the Commissioner stated:

> ***[W]hen certifying tenure charges against a tenured employee already suspended pursuant to N.J.S.A. 18A:6-8.3 or under N.J.S.A. 18A:25-6, boards must include all pertinent statutory references as well as the reasons justifying imposition of the relevant statutes in all of the documents filed with the Commissioner so as to preclude later litigation as to whether payment of salary is owing. (Slip Opinion, at p. 24)

The resolution in question states:

> RESOLUTION OF THE BOARD OF EDUCATION
> OF BORDENTOWN REGIONAL SCHOOL DISTRICT
> TERMINATING SALARY PAYMENTS TO
> CHRIS A. GERVASIO
>
> WHEREAS, the Board of Education of the Bordentown Regional School District has previously filed tenure charges against Chris A. Gervasio and pursuant to the provisions of

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N.J.S.A. 18A:6-[14] has been making salary payments to Mr. Gervasio since the expiration of the 120 calendar days from the date of certification of charges against him; and

WHEREAS, criminal charges have since been filed against Mr. Gervasio resulting in an indictment on or about May 21, 1986; and

WHEREAS, Honorable Bruce R. Campbell, ALJ, by Order dated May 22, 1986, has determined to stay the proceedings involving the tenure charges until September 2, 1986, and further has determined that the Board of Education is not required to continue to compensate Mr. Gervasio during the delay in these proceedings.

NOW, THEREFORE, BE IT RESOLVED, as follows:

1. Effective May 22, 1986, salary payments to Chris A. Gervasio shall cease pursuant to the provisions of the Order of Bruce R. Campbell, ALJ, referred to herein and further pursuant to the fact that an indictment has been issued against Chris A. Gervasio relating to the substance of the tenure charges against him.

2. The actions of this Resolution are made retroactive to the date of May 22, 1986, so as to confirm and ratify the cessation of salary payments which took place as of that date.

(Exhibit B)

The above document plainly states that, having previously filed tenure charges against respondent, it was the Board's intention, "pursuant to the provisions of N.J.S.A. 18A:6-[14]" (Exhibit B) to cease "***making salary payments to Mr. Gervasio since the expiration of the 120 calendar days from the date of certification of charges against him" and, further, "pursuant to the fact that an indictment has been issued against Chris A. Gervasio relating to the substance of the tenure charges against him." (Id.) Notwithstanding that the Board also resolved to so cease such payment in reliance on the ALJ's erroneous Order, Decision on Motion of May 22, 1986, correction for which was made by resolution of the Board dated July 8, 1986 (Exhibit C), the Commissioner finds that the June 17 resolution (Exhibit B) conforms with those requirements set forth in Martin, supra, and McGuire, supra, in that it set forth the reason for its ceasing such payments, that is, because he had been indicted and it also set forth the statutory basis for its action, that is, N.J.S.A. 18A:6-14.

Moreover, the Commissioner concurs with the ALJ's conclusion, also found in his Order, Decision on Motion dated December 10, 1986, that "nothing in N.J.S.A. 18A:6-8.3 or in the related statute, N.J.S.A. 18A:6-14, suggests that a suspension of

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salary in conjunction with a suspension from duties by reason of indictment can be made retroactive." (at p. 3) Thus, the Commissioner finds and determines that respondent is entitled to any monies or benefits he received until the Board acted on June 17, 1986 to invoke the indictment exception. Martin, supra The Commissioner further concludes, as did the ALJ, that the Board "properly invoked the indictment exception of N.J.S.A. 18A:6-8.3 in its resolution of June 17, 1986" and, further, that "Gervasio was entitled to all salary and emoluments up to the effective date of the resolution." (Id., at p. 4)

However, the Commissioner rejects that portion of the ALJ's Order, Decision on Motion dated December 10, 1986 that awards interest on any such amounts due and owing respondent. The Commissioner's review of the record convinces him that respondent has failed to demonstrate bad faith on the part of the Board as required in assessing pre-hearing interest. Board of Education, City of Newark v. Levitt and Sasloe, 197 N.J. Super. 239, 244 (App. Div. 1984)

Finally, the Commissioner adopts as his own, for the reasons expressed in the initial decision dated May 26, 1988, the conclusion of the ALJ that Chris A. Gervasio has forfeited his employment with the Bordentown Regional School District Board of Education by operation of N.J.S.A. 2C:51-2. He is, therefore, disqualified from holding any office or position of honor, trust or profit under this State or any of its administrative or political subdivisions, pursuant to N.J.S.A. 2C:51-2(c).

Accordingly, the Commissioner orders that a copy of this decision, forthwith, be forwarded to the State Board of Examiners for its review and, in its discretion, further appropriate action pursuant to statute and regulation.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

July 8, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3906-87
AGENCY DKT NO. 121-5/87

GEORGE HATT,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD,
Respondent.

Reba Carmel, Esq., for petitioner
(Oxfeld, Cohen, Blunda, Friedman, LeVine & Brooks, attorneys)

Nathanya G. Simon, Esq., for respondent
(Schwartz, Pisano, Simon & Edelstein, attorneys)

Record Closed: April 7, 1988 Decided: May 23, 1988

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

On May 1, 1987, petitioner, George Hatt, filed a petition of appeal with the Commissioner of Education alleging that he had seniority in the position of secondary subject coordinator for mathematics. Respondent filed its answer on June 5, 1987, denying it had violated petitioner's tenure and seniority rights. On June 5, 1987, the matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

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A prehearing conference was held on August 11, 1987, at which time the issues were isolated and a hearing was scheduled for November 24, 1987. The hearing was held on that date and continued to January 6 and January 13, 1988. At the conclusion of the hearing, a briefing schedule was established and extended at the request of counsel for good cause shown. The record closed on April 7, 1988, subsequent to a further letter submission from counsel for respondent. Witnesses who testified and documents considered in deciding this case are listed in the attached appendix.

UNDISPUTED FACTS

At issue is whether respondent violated petitioner's tenure and seniority rights by failing to appoint him to the position of secondary subject coordinator for math, grades 7 to 12. More particularly at issue is whether petitioner acquired tenure as a supervisor in the position of department chairperson and, if so, whether petitioner's seniority in the position of department chairperson may be applied to the newly created position of secondary subject coordinator for math.

Pursuant to the prehearing order, the parties provided this tribunal with a stipulation as to a number of pertinent facts and documents regarding this matter. The stipulation of facts (J-1), as well as the exhibits referred to therein (PA-1 through PA-27), is incorporated by reference here and constitutes this tribunal's partial findings of fact.

A review of the stipulation of facts indicates that petitioner began his employment in respondent's school district in September 1955 as a teacher of mathematics at the junior high school level. He initially held a limited teacher's certification in mathematics, English and general science for grades 7 through 12, receiving a permanent secondary teacher's certificate in the aforementioned disciplines and grades on July 10, 1957. He received certification as a principal/supervisor in May 1980.

In April 1958, respondent approved petitioner's appointment as "staff committee chairman of the Bloomfield Junior High School" for the 1959-1960 school year. Between the school years 1959-1960 and 1964-1965, inclusive, petitioner received an annual

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stipend for his role as "staff chairman." That stipend was discontinued in 1965 and has never been reinstated. Petitioner continued in the position of junior high school mathematics teacher and "staff chairman."

On September 1, 1979, a job description for the position of "department chairman" was developed. The job description was supplemented by internal administrative directives and practices concerning the performance of the department chairman. Apparently, petitioner began to function in the capacity of department chairman, the successor position to "staff chairman."

On June 18, 1985, petitioner was informed by letter from the superintendent of schools that beginning in September 1986, the job designation of "department chairman" would be continued only at the senior high school level and that, based on current information, petitioner would be assigned to the position of "department chairperson of mathematics at the senior high school." This modification was due to the planned grade reconfiguration of the senior high school to include the ninth grade and was conditioned on potentially changing factors that might alter this plan. Subsequently, as part of its overall reorganization at the secondary level, respondent determined to abolish all department chairmanships and to create the more comprehensive position of "secondary subject coordinator." On March 7, 1986, petitioner was notified by the superintendent that he would be assigned to South Middle School in September 1986. He was notified on March 20, 1986 that he would be a "member of the teaching team assigned to the seventh or eighth grade house." On April 7, 1986, respondent officially abolished the position "department chairman" at all levels, and in all subject areas.

On April 7, 1986, respondent officially authorized the creation of the positions "secondary subject coordinators for grades 7 through 12 in the areas of business education, English, health and physical education, home economics, industrial arts, science and social science" and simultaneously approved job descriptions enumerating the duties encompassed by the new positions. Although a similar position for mathematics had been earlier contemplated, it was not approved at this time because it was felt that the responsibilities for coordination of the grades 7 through 12 program could be subsumed in

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the role of the existing K through 12 mathematics supervisor. On April 28, 1986, petitioner was notified by letter from the superintendent of the board's action and that his assignment for the 1986-87 school year would be "within your area of certification." Thus, in September 1986, petitioner reported to his newly assigned teaching post at South Middle School.

When it became apparent in December 1986 that the broad and supervisory duties of the secondary subject coordinator were too demanding to be assumed by the K through 12 mathematics supervisor, the position of secondary subject coordinator of mathematics was posted. On January 6, 1987, petitioner applied for the position. Although petitioner was among the candidates interviewed, he was not selected by the interview team as the nominee for the position. On March 9, 1987, Roger Marchegiano was officially appointed by the Board to the aforementioned post, effective April 15, 1987.

Mr. Marchegiano began his employment in respondent's school district as a teacher of mathematics at South Junior High School in September 1973. Certified as a teacher of mathematics in June 1973, he became certified as a principal/supervisor and supervisor in May 1979. He served in the position of department chairman-mathematics at North Junior High School from September 1982 until June 30, 1986, at which time the position was abolished. He served as a "team leader" at North Middle School during the 1986-87 school year until April 15, 1987, the effective date of his appointment as secondary subject coordinator.

As a ten-month department chairman in 1985-86, petitioner's annual base salary (excluding longevity) was $39,231 as compared to the $34,976 ten-month salary in the same year for a teacher of equivalent experience and education. Petitioner thus earned $4,255 more than a classroom teacher. When petitioner resumed the role of classroom teacher in 1986-87, his base teacher's salary was $37,500, as compared to the $42,012 ten-month base salary for a secondary subject coordinator of equivalent experience and education. Petitioner's 1987-88 ten-month base teacher's salary is $40,159 whereas the corresponding ten-month base salary for the secondary subject coordinator is $45,978 or $5,819 more.

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TESTIMONY

In view of the stipulation entered into between the parties, testimony at the hearing centered upon a factual consideration of the requirements of the two positions at issue (department chairman and secondary subject coordinator). More to the point, the focus was directed to the issue of whether the duties of department chairperson are essentially the same as, or identical to, those of the secondary subject coordinator, the position to which petitioner was not appointed and the position he seeks to gain as a result of this litigation. In support of his allegation that the position of department chairperson is closely akin to the position of secondary subject coordinator, petitioner relied on his own testimony and the testimony of Charles Nankivell.

George Hatt assumed the stand on his own behalf. He testified that he had served as math department chairman/staff chairman for grades 7 through 9. Noting that the titles of department chairman and staff chairman are interchangeable, he stated that when he served as staff chairman in 1958, he supervised other subject areas in addition to his own major field.[1] (This was different from a "subject specialist," who supervised only one subject.) Although the title of staff chairman changed to department chairman in or about 1974 to 1975, the duties did not change. Thus, he actually held the position of department chairman from September 1958 to June 1986.

Referring to the job description for department chairman (PA-7), Hatt indicated that he had input into the job description. He revealed that as a department chairman he analyzed problems and looked for ways to implement board policy and rules. He set up programs to achieve specified goals. He was involved in "everything" from the formulation of disciplinary rules to forms for lesson plans. He stated that he supervised 13 to 15 teachers in math, physical education, industrial arts and music. He made sure their lesson plans were current and the equipment was proper, he evaluated and

[1]The areas of physical education, music, industrial arts and foreign languages did not have staff chairmen but had district-wide coordinators with multi-building responsibility. Thus, Hatt admitted that he supervised these areas only sometimes; the district-wide coordinator did the evaluations. He was not sure if a district-wide coordinator needed a supervisory certificate.

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supervised the progress of the teachers, and he trained substitutes. He made three or four observations a year of a teacher's achievement and was involved in the annual evaluation. He made recommendations for hiring and annual increments, as well as recommendations for future in-service training. He ran subject area meetings and was involved in the budget process. He noted that there were department chairmen in four subject areas: math, English, social studies and science.

Referring to the job description for secondary subject coordinator (PA-12), he indicated that this new position was substantially the same as the position of department chairman. He stated that it all "comes down to supervision and evaluation of persons and program, budgeting and housekeeping," which may be found generally within the job description for department chairman (PA-7). He indicated he was informed that he did not receive the position because another candidate "tested better." Since no test was required, he believed the statement meant that the interviewers felt someone else could do the job better.

On cross-examination, Hatt indicated that in 1958 the position of subject specialist was combined with the position of staff chairman; one position served both functions. Solicited by the principal for the position, he served as a staff chairman from 1958 until he became a department chairman in the 1970's. Apparently, as a staff chairman, he taught four periods and remained unassigned for two periods to give him the opportunity to supervise teachers and substitutes. Noting that until 1980 he held certification only as a teacher, he indicated that there was no requirement for any other certification. Thus, he opined that during the time he functioned as a staff chairman he supervised and evaluated without a supervisory certificate. More particularly, Hatt testified that he observed and held a conference with the teacher, who initialed the evaluation. He explained that the staff chairman wrote the teacher's annual evaluation on behalf of the principal, who used it in whole or in part. The ultimate signatory on all evalutions, the principal did not necessarily meet with the teacher or complete the individual evaluation, which was not required. He was not sure how the process worked in the other buildings. In the mid to late 1970's his teaching load was decreased to three periods.

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In further testimony, Hatt revealed that as department chairman he had the same functions he had as a staff chairman. The department chairman's position also did not initially require a supervisory certificate. Noting that a secondary subject coordinator must hold a certificate, he alleged that as soon as the policy requiring a supervisory certificate for department chairmen became known, he got his certificate. He believed all department chairmen were certified from 1978 to 1986. He indicated that as a department chairman he had meetings with all the department chairmen and the principal. Several times a year (approximately once a month), the chairmen in the same areas from the entire district would meet. In the positions of department chairman and staff chairman, he had no responsibility for grades 10 through 12 and had no assignment at the high school.

On redirect examination, he indicated that at the meetings with other junior high school and senior high school math department chairmen, the program was developed and textbooks were discussed. Thus, he opined that he participated in program development at the high school. He indicated, however, that he never did an evaluation at the high school and did not monitor the implementation of high school programs, which was done by the department chairman at the high school. Further, he admitted that he had no direct knowledge regarding the role of the secondary school coordinator.

Next to testify on behalf of petitioner was Charles Nankivell, principal of Bloomfield Middle School for the last two years. A teacher of math at Bloomfield Junior High School from 1958, he served as department chairperson of science at South Junior High School from 1963 until 1975. An administrator since 1975, he served as principal at South Junior High School (grades 7 through 9) from 1975 until 1985 when South Junior High School became South Middle School. Nankivell holds a teaching certificate for science and math, a supervisor's certificate and a school administrator's certificate.

Noting that he has worked with Hatt since the beginning of his employment, he stated that Hatt assisted him in his pretenure years. Recalling that Hatt served as department chairman in mathematics and the chairman of the social living committee at South Junior High School, he explained that this latter assignment was made by the

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principal to assist the building administrator and staff members. He recalled that Hatt, who reported to him, directly administered the math department. He observed, supervised and evaluated the math staff. He assisted in preparing the budget for the math department and served as a member and chairman of the curriculum revision committee.

He contended that the responsibilities of all department chairmen extended beyond their disciplines. Thus, for example, Hatt supervised, observed and evaluated teachers in the industrial arts area. Referring to the job description for department chairman (PA-7), he indicated that Hatt functioned under it and that it accurately described Hatt's duties as the department chairman. Hatt taught three classes and evaluated tenured and nontenured teachers in math and, depending on the staff breakdown, other areas such as industrial arts, foreign language, social studies and English.

Referring to the Evaluator's Guidelines for Professional Staff Evaluation (PA-8), Nankivell noted that the department chairman was to observe and evaluate all staff members in the subject area department and, as directed by the school principal, could be designated to assist the librarians and in such areas as music and fine arts as well. Thus, from time to time Hatt evaluated different subject areas. Of import, Nankivell indicated that Hatt had no district-wide evaluative duties.

He further explained that the staff was divided into five committees, each embracing a different discipline or purpose.[2] Each committee, which could consist of 11 to 13 teachers, included a math teacher, an English teacher and a science teacher and was headed by a department chairman. Teachers were selected to the committee because they were felt to have knowledge in that area. No additional compensation was given for such service. Hatt, as chairman of the social living committee, was responsible for the observation of all members on his committee. Thus, teachers' final evaluations were the result of evaluations by the department chairman, the chairperson of the committee and one of the building administrators. The idea was to look at teachers from various viewpoints.

[2] For example, guidance, health, citizenship and social living.

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Nankivell noted that as a department chairman and as a principal he was involved in town-wide committees set up by the superintendent. He explained that these district-wide committees were established as needed to review and revise curriculum and textbook selection affecting the entire subject area. Hatt served on the committees and for a brief time was involved in staff development.

In further testimony, Nankivell revealed that the math committee coordinated the books and materials between the schools. The committee could make instructional recommendations which might have budget implications. The committee made no staff recommendations, did not evaluate staff, and did not have budget responsibility.

Familiar with the function of a secondary subject coordinator, Nankivell noted that he was part of the committee to develop the title secondary subject coordinator, although the job description was actually formulated by the superintendent and assistant superintendent. When the ninth grade moved to the high school and the middle school (7 and 8) was housed in one building,[3] the department chairperson's position was eliminated. Since the middle school organization did not allow for department chairpersons,[4] the position of the secondary subject coordinator was created. Indicating that the job description (PA-12) accurately reflects what was envisioned, he explained that he has direct contact with the coordinators both in and out of the building. He sees them once a week, although they may be in the school at other times observing and supervising teachers. Noting that their observations are limited to classroom experience (an evaluation is an overall view of the teacher's activities in and out of the classroom), he indicated that coordinators are also involved in staff evaluations. They make recommendations for budget, books and materials. According to Nankivell the subject

[3] Apparently in 1986-87 there were two middle schools and no department chairpersons.

[4] Noting that the difference between the junior high school and the middle school is the structuring of the students, he explained that the junior high school used to be departmentalized. The middle school is now split up into houses and units. The team leaders, whom Nankivell meets with regularly, are involved in curriculum and have responsibility for their units. There are 14 leaders in each grade. The team leader is evaluated in his discipline. In each team there are English, math, social studies and science teachers.

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coordinator does in two buildings (the Middle School and the high school) what was previously accomplished by the department chairperson in one building. He indicated, moreover, that the secondary subject coordinator does not cut across interdisciplinary lines at the middle school.

Referring to a memorandum to him from Dr. Schiller regarding the responsibilities of secondary subject coordinators (PA-25), he indicated that it clarifies their responsibility and gives a breakdown of the time they should devote to the middle school. He stated that they must provide one observation of nontenured staff in their department which is considered in the final evaluation. This duty was also performed by the department chairpersons. Although in the middle school a coordinator has no custodial or disciplinary responsibilities and holds no classes, Nankivell explained that a ratio was established to determine how many classes a coordinator teaches at the high school.

On cross-examination, he indicated that he received his supervisor's and principal's certificate in the early 1960's and his school administrator's certificate in the late 1970's. Although he believed he held a supervisory certificate when he became a department chairperson, he could not recall if other chairmen had theirs. Although originally there was no requirement for the certificate, it was later required. Referring to the job description for department chairperson (PA-7), he indicated that it was the job description both prior to and during the 1980's He could not say when the job description regarding certification changed.

Referring to salary, Nankivell was not sure if department chairpersons were reappointed yearly. Recalling that initially a chairperson received a separate check as a stipend, the sum was later included in the annual pay and a salary guide was generated. The department chairperson position was considered part of the teachers' bargaining unit. In addition, the board did not take action in regard to committee chairmen and did not give them additional compensation. Service on the committee was a part of the role of department chairperson.

He further revealed that because there was no chairperson for industrial arts, the

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chairperson for math always had responsibility for industrial arts. Opining that the organization was similar at North Junior High School, he believed that department chairpersons at North evaluated departments other than their own. He was not sure, however, if the committees functioned in a similar fashion at the high school or at North Junior High School. Noting that the final written evaluation is the responsibility of the building principal and carries the building administrator's signature, he revealed that the department chairmen had responsibility for evaluation because the building principal needed their expertise. The building principal evaluated the department chairmen.

In further testimony, he indicated that the department chairpersons at the junior high school did not make observations or teach at the high school. They had no evaluation responsibility at the high school, no responsibility for the scheduling of teachers or students at the high school, no responsibility for budget at the high school, and no direct responsibility for coordinating curriculum and textbooks for the high school. Moreover, although there were meetings for coordinating curriculum and textbooks and for coordinating levels of instruction, high school chairpersons had no responsibility to come to the junior high school or vice versa. The calendar year for the department chairperson was the same as for a teacher.

On the other hand, the secondary subject coordinator, although not physically in the middle school very much, has responsibility for coordinating the textbooks and supplies at the middle school and the high school and has input into the budget at the middle school. In fact, in a majority of the instances, Nankivell accepts the recommendation of a secondary subject coordinator regarding curriculum. He also revealed that he expects to meet with secondary subject coordinators regarding evaluations (they evaluate only within their discipline) and he consults with secondary subject coordinators regarding interviews and hiring.

Assuming the stand on behalf of respondent was James McNasby, employed by respondent as principal of the high school since February 1979. From 1967 to 1979, he served as a teacher and an assistant principal in Middletown, New Jersey. He is certified as a teacher of English and social studies and holds a principal's and an

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administrator's certificate. He explained that from 1979 to 1986, there were two assistant principals, one vice-principal and nine department chairpersons at the high school. There were no department chairpersons in art, music or special education. For the most part, the assistant principals handled those areas.

Referring to the job description for department chairperson (PA-7), he indicated that it outlined the duties of the department chairperson at the high school. All department chairpersons taught three classes. (The usual teaching load was five classes.) Department chairpersons did not evaluate teachers outside their area or outside the high school and had no curriculum responsibility at either the junior or senior high schools. The chairpersons did not have responsibility for staff development, for the physical structure of the high school or for evaluation of custodial staff. The department chairpersons also did not have direct responsibility for the preparation of the budget but rather allocated the money the department received. (The chairpersons were responsible for having the proper number of textbooks and supplies and, if the department chairman had additional budgetary needs, McNasby might adjust the budget depending on all the needs in the school in a given year.) Although department chairpersons were responsible for class observations and gave teachers a chance to have input into their evaluation, McNasby indicated that he had the ultimate responsibility for evaluating the teaching staff. He adjusted, finalized and signed the annual evaluation with the teacher.

In explanation of the change from department chairpersons to coordinators, McNasby recalled that in light of declining enrollment there was talk of closing schools. When it looked as if there would be a consolidation in the high school (the senior high school eventually became a 9 through 12 high school), McNasby realized that his administrative needs could not be met with department chairpersons. Thus, he proposed to Dr. Harold Morris, the superintendent of schools, that the job be redesigned to facilitate the increased staff and students at the high school. Noting that with the involvement of the community he had planned the reorganization for two years, McNasby explained that the idea of the reorganization was to create schools within a school. Thus, in order to deliver a clean, safe and orderly education, the high school was divided into workable units. Opining that this could not be accomplished with department chairpersons

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and that there had to be better articulation among the three schools, McNasby recalled various discussions with Dr. Morris concerning a job description for a secondary subject coordinator. More particularly, he explained that the foreign language and home economics chairpeople received an additional stipend to make observations at the junior high school (McNasby was not sure if they were involved in curriculum coordination). However, he indicated that department chairpersons at the high school had no responsibility at the junior high school. There was, thus, no coordination or articulation between the junior high school department chairmen and the high school department chairmen and, in fact, department chairmen did not travel from one building to another.

Referring to the position of secondary school coordinator, McNasby revealed that he had direct responsibility for drafting the job description and had worked with Ms. Thompson and Dr. Morris in drafting it. (He did not recall there being a formal committee.) Since September 1986, he has observed the secondary school coordinators. Opining that the position is akin to the position of an elementary school principal, he explained that each coordinator is responsible for an academic department and a specific area of the high school which includes his discipline as well as other disciplines. (McNasby tries to put the particular discipline into a particular geographical location.) Noting that each area has its own custodian, he stated that the secondary subject coordinator is responsible for maintaining a school area and for supervising the custodian's work. Also, the secondary subject coordinator is responsible for the classrooms in his area and is the first line of discipline for all students in the area from all disciplines. In the past, the assistant principal was the first line disciplinarian and department chairmen had no responsibility for discipline in their geographic area. McNasby revealed that since the assistant principal staff numbered the same as prior to the reorganization, the secondary coordinators were necessary to assist with disciplining the larger number of students after the reorganization.

In regard to in-service staff training and staff development,[5] McNasby indicated

[5] McNasby explained that the terms in-service staff training and staff development can be used interchangeably, although in-service staff training occurs in school and staff development may take place outside of school.

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that secondary subject coordinators must be instructional leaders; they should be aware of the instructional model adopted by the Board (which links educational goals with teaching strategies), and be proficient in its use. Thus, a teacher who had questions about the model could go to the secondary subject coordinator for instruction.

McNasby further testified that he had been reluctant to use department chairmen as full-fledged administrators, i.e., as part of the administrative team. Noting that department chairmen were part of the teachers' bargaining unit, McNasby contended that they did not have the requisite separation between their duties as teachers and their duties as administrators. He used the secondary subject coordinator to set policy and resolve problems in the school, to develop a budget, to talk collectively about the needs of the school (there is a collective decision as to fiscal allocation), and for staffing and scheduling. (Although department chairmen were involved in the interview process on rare occasions, secondary subject coordinators play a more significant role.) He explained that the secondary subject coordinators assumed the role previously held by the assistant principal; they articulate and coordinate curriculum, grades 7 through 12, and have responsibility for textbooks, supplies and equipment. He further indicated that secondary subject coordinators are responsible for one observation of a nontenured teacher at the middle school and, if their expertise is needed, would evaluate tenured teachers. McNasby testified that the coordinator position is a supervisory position requiring time and effort beyond the normal calendar year and, thus, requiring additional compensation (R-3). Secondary subject coordinators teach classes depending upon the number of teachers they supervise (R-3).

On cross-examination regarding in-service training, McNasby recalled that in the mid-1980's department chairmen were involved in district-wide committees to deal with in-service training. He recalled that there had been a "strategy committee" which focused on how to get teachers to accept the instructional model. The committee developed in-service programs which began on the elementary level. The district-wide curriculum committee exists today in name only. In regard to articulation, he indicated that the biggest problem was that the junior high schools used different textbooks and lacked coordination. Thus, the district-wide committee for grades 7 to 12 included

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department chairmen from the junior high schools. Noting that the committee no longer exists, he explained that the secondary subject coordinator functions to assure that all seventh-grade teachers teach the same subject content. The position of director of instruction, a central office position, was established July 1, 1987 to coordinate all subject matters in the entire curriculum. Secondary subject coordinators report to the director.

Focusing on the area concept, McNasby admitted that only two departments included disciplines other than their own. Noting that some departments monitor non-instruction, he stated that if an English class is located in a math area, the math subject coordinator would not evaluate the English teacher. Also, the English teacher would first approach the English coordinator for a disciplinary problem. He admitted that for a large portion of the teaching staff, his evaluation entailed simply his signature.

In further testimony, McNasby revealed that in the 1986-87 school year, the coordinators expressed concern that they were not being paid enough. Sympathetic, McNasby said he would testify before the board of education. The dispute was resolved in contract settlements. He admitted that Article 6 of the 1983-86 contract between the Bloomfield Board of Education and the Bloomfield Supervisors' Association (P-1), allowing the work year for supervisors to be extended for five days, had nothing to do with the coordinator position (see P-1 and P-2). Referring to P-2 (the contract for 1985-87), he indicated that the language of Article 6 did not differ from P-1. Moreover, he was not aware of any grievances filed by the association regarding the difference in the two jobs, nor did he have any knowledge of a former association president grieving the two jobs. In fact, he testified that the Bloomfield Supervisors' Association, through its president, Spencer Tracey, essentially admitted that the jobs were not the same and that the secondary subject coordinator had to be paid at a higher rate. (Although he referred to letters from Edward Berk, president of the Bloomfield Supervisors' Association (P-3 and P-4), he indicated that he had not seen those letters before and that they did not change his mind as to the supervisors' association's view of the position.) Quite simply, McNasby believed the two positions were different.

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On redirect examination, McNasby explained that in the past the department chairmen reported to and were evaluated by the appropriate principal. Since the coordinators have multi-level responsibility, they are evaluated by McNasby, the middle school principal and the director of instruction. Referring to teacher evaluations by the coordinators, he explained that the coordinator, in concert with the teacher, arrives at a complete evaluation, which is formalized by an assistant principal. Recommendations for personal improvement are made by the assistant principal and the secondary coordinator. At present, he does not meet with all the teachers; he becomes involved only if the evaluation is unsatisfactory. In contrast, the department chairmen were responsible for the basic observation; McNasby did the remainder of the annual evaluation with the teacher and signed it. Referring to P-1 in evidence, McNasby indicated that before the position of secondary subject coordinator was instituted, he recalled no instance where a department chairman extended his work year. That clause in the contract has been invoked only since the creation of the position of secondary subject coordinator.

Next to testify was Roger Marchegiano, employed by respondent since 1973. He served as a math teacher until September 1982 and as math department chairman at North Junior High School from 1982 until June 1986. Marchegiano taught at North Middle School during the 1986-87 school year; in April 1987, he was appointed secondary subject coordinator of math for grades 7 through 12, the title he presently holds. He is certified in math, K through 12, and since 1979 he has held a principal's and a supervisor's certificate.

Having served in both positions, Marchegiano testified as to the difference between his duties as department chairperson and as secondary subject coordinator. More particularly, he testified that as department chairperson he taught three classes (he would have taught five classes if he had not been a chairman). He observed the staff and assisted in the annual staff evaluations of the math, industrial arts and business departments. He coordinated textbooks, related information to the staff as a subject specialist, and assisted in the budget process by informing the principal of necessary books and materials for the department. Noting that he did not have multi-building responsibility, he indicated that the job description for department chairperson

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incorporates what his duties were, except for the rescheduling of substitutes which was accomplished by the principal.

He advised that the duties of a secondary subject coordinator are different from those of a department chairperson. Supervision and evaluation is now accomplished for six grades, not three. He no longer supervises industrial arts, and does not evaluate outside his discipline, except for custodial staff. More particularly, he stated that he administers an area of the building, which could involve a class other than math, and, as such, is responsible for everything that goes on in the area, i.e., student discipline, orderliness, and maintenance of the building. Although as department chairperson he was not responsible for disciplining students, now he is the first line administrator in the disciplinary process. When a teacher sends a student to him, he decides what should happen, i.e., whether it is serious enough to involve a principal or a nurse, etc.

Further, as department chairman it was his job to make sure classes used textbooks approved by the board of education. As a coordinator with responsibility for grades 7 to 12, he is responsible for 10 to 12 textbooks. He evaluates the effectiveness of the curriculum and makes curriculum changes and textbook revisions. Of note, in the middle school, curriculum could be determined through a central theme shared by four curriculum areas. He further explained that as a department chairperson his budget responsibility was limited to "math supplements" only, and he did not participate in the budget for the business or industrial arts department. As a coordinator, his area of responsibility could extend to textbooks or any equipment (chairs, bulletins boards) in his area. He actually makes out purchase orders, which he did not do as a department chairperson.

Moreover, when the position of department chairman existed, there was little coordination between the buildings. Under the coordinator system, there is greater articulation between the buildings. He further recalled that when the position of department chairman existed, approximately six meetings a year were run by Tom Hooper, district-wide supervisor for math and computer sciences. Marchegiano revealed that now he runs meetings which lead to proposals, and he is personally responsible for ensuring the math performance of students in grades 7 through 12.

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Referring to the scheduling of staff, he indicated that as the department chairperson he had no responsibility for creating the schedule; the vice-principal formulated the schedule with his help. He was involved in changing a student's math schedule only if the guidance department asked for his help. As a coordinator, Marchegiano determines the number of classes in each subject and the staffing at the high school and is directly involved in all changes in a student's math schedule. Although unsure of his role in the middle school, he noted that he has input as to the math teachers' schedules at the middle school. As a department chairman, he was involved in the interview process by invitation. As a coordinator, he has increased responsibility and is involved in many more interviews. In fact, he offers suggestions as to the particular grade to place a teacher.

Referring to his dealings with parents, he indicated that, as an administrator, he now calls parents directly regarding a discipline problem. Thus, he speaks to many more parents as a coordinator than he did as a department chairperson. Moreover, he indicated that as a department chairperson he was not involved in writing grants. Now, the secondary subject coordinator is responsible for writing grants, which the principal signs off on. Testifying as to his work day, he indicated that as department chairperson he taught three classes. The day started at 8 or 8:15 a.m. and ended at 3:05 p.m. He received extra compensation for summer work. Although he had a "five-day extension" in his contract, he was not asked to work extra days until September 1987. As a coordinator, he works from 7:45 a.m. to 3:25 p.m. (later at the middle school). He teaches two classes at the high school (a teacher teaches five classes and has one "contact" period).

In regard to in-service training, he indicated that he is the instructional leader. As such, he presents the instructional model and information for use in the classroom. When he was the math department chairman, he was not involved in instructional models. He would simply advise the staff of speakers and give them the option to attend. He further revealed that as a department chairman he did not have meetings with the building principal. As a coordinator he has regular weekly meetings with the principal of the high school at which discussions are held and problems aired. He is at the middle school one-half day a week (he could be there two or three times a week) and frequently talks to the

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administration. He further revealed that he is involved in evaluating teachers of compensatory mathematics. He deals with Mr. Abrahamson, the central office supervisor of mathematics for grades 7 through 12, in regard to these teachers. He is also involved with the director of curriculum, Carole Kernan. He recalled that as a department chairman he reported to Nick Selzo, assistant to the superintendent for curriculum instruction, and submitted building goals to the principal. Noting that the reporting requirement is much the same in both jobs, he explained that when he was a department chairman, any changes came from Selzo. Now, he initiates the changes and they are sent through the central office. The goals which emanate from his office extend from grades 7 to 12 and are, thus, more global.

In summary, Marchegiano indicated that the position of secondary coordinator is different from the position of department chairman. The department chairman position was limited to one building and allowed for decisions in conjunction with other department chairmen. He was responsible for minor decisions which were issued by him as a director. Now, he is responsible for curriculum and instruction on additional grade levels. He monitors each subject and recommends changes when necessary. Referring to the new concept of a "school within a high school," he asserted that he is now responsible even for the physical equipment. Attendance at meetings and functions is now part of his job description.

On cross-examination, he indicated that as a department chairman although his duties were defined, he received assignments from the principal. Thus, he recalled being assigned to observe industrial arts and business teachers. As a secondary subject coordinator, although he is responsible for the classrooms and disciplinary problems in his area, he has no interdisciplinary instructional responsibility; he does not evaluate an English teacher for content or instructional model.

He admitted that prior to becoming a secondary subject coordinator, he was involved in staff development; he went if invited. Although he did not recall serving on a particular committee, he indicated he was involved with the math department chairmen in the other two schools and attended meetings. More specifically, he was involved in

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textbook selection for the junior high schools, and he recalled meetings in which curriculum development was discussed. He recalled serving on the curriculum advisory council, a district-wide committee. He was not sure, however, if he served on it in his capacity as teacher or as department chairperson. He was involved in a summer program to revise curriculum. Moreover, as department chairman, he was responsible for submitting textbook orders to the principal and he recommended ordering new textbooks if they were outdated. He discussed his recommendations with Tom Hooper, the district supervisor of the math curriculum. If there was a need, Hooper formed a committee. Marchegiano served on the committee, which included Marchegiano and, if the change affected the high school, the senior high school department chairman. The committee then made a recommendation which went to the board of education.

As a secondary subject coordinator, if the textbook is outdated he informs the director of curriculum that he is taking measures to replace it. He forms and chairs a committee, reviews the available textbooks and makes a recommendation for the purchase of the textbook to the director of curriculum. If agreed to, the recommendation is sent to the board of education for approval and, if approved, he places the order.

In further testimony, he indicated that as a department chairman he wrote only part of the teacher's evaluation. He went over the personal improvement plan with the teacher and submitted his statement of the teacher's performance to the principal. He alleged that he never saw the actual evaluation form. As a secondary school coordinator, he has made observations but has not yet done annual evaluations. Contemplating a more involved role, he indicated that in the high school, he will write the entire evaluation with the teacher. Then, he will meet with the assistant principal for input and, ultimately, the evaluation will go to the principal of the high school.

He further recalled that last year as a department chairman he received training in the instructional model. He passed some of the information on to the teachers on an informal basis. Noting that there were department chairmen, such as those in home economics, who had multi-building responsibility, he revealed that as a department chairman, he had seven periods. Of those seven periods, he taught three periods, had one

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preparation period and had three periods for department chair duties. Now, he has eight equal time periods. He teaches two periods, prepares for one period and the rest of the periods are devoted to secondary school coordinator duties. He explained that the number of classes taught by a coordinator depends on the number of teachers in a department.

In regard to budgeting, he revealed that as a department chairperson, he made recommendations to the principal for textbooks and institutional equipment. The building principal gave him a budget figure, and if he ordered more than this amount something was cut. As a secondary school coordinator, he develops a budget and is not told by his supervisor how much money to spend. The coordinators collaborate with the principal and decide what is best for the school. As a department chairman, he was responsible to the building principal, to the town-wide supervisor of the math and computer science curriculum, Tom Hooper, and to Dr. Selzo, assistant to the superintendent of curriculum and instruction. As a secondary school coordinator, he reports to the building principal and is also responsible to the director of curriculum, Carole Kernan (akin to Selzo's job).

On redirect examination, Marchegiano recalled meetings of the curriculum committee in the summer of 1976 in regard to the minimum basic skills test. Attendance was voluntary, exclusively in the teacher's subject area and reimbursed by a stipend. He further revealed that he taught at South Junior High School from 1973 to 1981 and that Hatt was his department chairperson. From September 1978 until February 1979, he served as acting chairperson of math since Hatt had been involved in an accident. He performed all Hatt's duties and assumed his teaching schedule. He testified that the job at South Junior High School was similar to his job at North Junior High School.

In an effort to rebut the above testimony, George Hatt resumed the stand. Regarding the evaluative function of the position of department chairperson, he indicated that until there were evaluative guidelines, the department chairperson observed and evaluated personnel. He completed the observation and referred it to the principal. Noting that the evaluator's guidelines mandated certain minimum observations (PA-8), he indicated that the annual evaluation dealt with a teacher on a one-to-one basis. He wrote the actual evaluation and the principal, who always agreed with his evaluations, signed it.

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Referring to the job description for department chairman (PA-7), he indicated that the principal could give him other assignments. He was thus requested to attend interdepartmental meetings to describe the math program to parents. Referring to in-service training, he stated that the department chairman inspected plan books, evaluated a teacher's growth, observed a class, proposed teaching techniques and evaluated programs for their effectiveness.

Although he indicated that the principal was actually responsible for curriculum, he explained that a proposed change (possibly on the recommendation of teachers on the building committee to the department chairmen) could be referred by the chairmen to the informal town-wide committee, which was in effect from his appointment until the reorganization. The town-wide committee included the department chairperson of each junior high school (apparently, Hatt was responsible for the junior high school) and was chaired by the supervisor of math. The recommendation was referred from the town-wide committee back to the principal. The principal submitted the proposed changes to the director of curriculum. Hatt further testified that he was involved in a staff development committee in 1983-84 or 1984-85, a district-wide committee which dealt with improving the quality of instruction.

In further testimony, he stated that as department chairperson he was accountable to the building principal. Responsible only for instructional material, he submitted textbook proposals to the principal. As the staff chairman of the living committee, he was responsible for an interdisciplinary evaluation of those teachers on the committee. Referring to the basic skills program (BSIP), he considered himself the first resource for additional books, etc., although he had no input into the BSIP curriculum. In regard to the interview process, Hatt indicated that he attended interviews which took place during the school year. If outside the school year, he was called and asked if he would be available. He admitted that his involvement was limited to a vacancy within his building. He recalled that in the 1985-86 school year, there was a two-day workshop for the middle school teachers. He was not paid for this workshop, although the teachers were paid for two days.

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On recross-examination, he indicated that he wrote his evaluation of the teacher on the evaluation form. After the conference with the teacher, he submitted the evaluation to the principal for additions or deletions. The principal had the form typed, forwarded it to the teacher and asked the teacher if he wanted a conference. It was usually signed without a conference. The evaluation, typed and signed by the teacher and the building principal, was the official evaluation. On redirect, he indicated that the principal never changed his evaluations.

FINDINGS OF FACT

Based upon the testimony and evidence presented, I make the following findings of fact in regard to the two positions at issue.

Department Chairperson

The position of department chairperson was a building-based position. The department chairperson's basic purpose was to monitor the curriculum subject areas assigned and to assist in supervising the instruction and evaluation of teachers, as directed (PA-7). Although the usual teaching load was five classes, department chairpersons taught three periods (out of the total of seven 30-minute periods), had one preparation period and used the remainder of the time for department chair duties.

Department chairpersons, who were required to hold an administrative and supervisory certificate, evaluated teachers, as directed by the building principal, and did not evaluate teachers outside their area, except on an as-needed basis as specifically directed by the principal. More specifically, department chairpersons were responsible for classroom observations and assisted in the annual evaluation process, as directed by the principal. The principal had the ultimate responsibility for evaluating the teaching staff.

The department chairman had no responsibility for discipline in a specific geographic area and, in fact, during that time the assistant principal in the building was

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the first line disciplinarian. The department chairperson did not set policy or accomplish staffing or scheduling requirements. He had no specific curriculum responsibility, was not involved in in-service staff development, had no responsibility for the physical structure of the school, the evaluation of the custodial staff or direct responsibility for the preparation or development of the budget. Rather, the department chairperson allocated monies received for the department, had responsibility to order textbooks and supplies, could make budgetary requests to the principal and related information to the staff as a subject specialist. Department chairpersons were not involved in writing grants and were involved in the interview process only by invitation. Department chairmen were selected by the appropriate building principal and were represented by the teachers' union. Department chairmen did not work beyond the time required for a teacher by contract and were paid on a salary guide.

Math department chairmen reported to the building principal, the assistant to the superintendent for curriculum instruction and the town-wide supervisor of math and computer science curriculum. Math department chairpersons attended certain district-wide committees run by the district-wide supervisor for math and computer sciences, Tom Hooper, which committees were established on an as-needed basis and encompassed discussion of curriculum development. The committees' recommendation went to the principal for submission to the director of curriculum.

Secondary Subject Coordinator

The secondary subject coordinator is responsible for grades 7 through 12 in a particular discipline. The coordinator is required to hold a principal's certificate, a supervisor's certificate or a school administrator's certificate and to have a master's degree and five or more years of successful classroom teaching experience. The secondary subject coordinator reports to the principal or assistant principal and the director of instruction (a central office position). The coordinator is responsible for the administration, supervision and evaluation of all programs and services within his discipline and/or assigned area of responsibility at the senior high school and is responsible for assisting the middle school principal in the coordination of same.

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More particularly, the high school has been divided into certain units which may be described as "schools within a school." Each coordinator is responsible for an academic department in a specific area of the high school which includes his discipline as well as others. (More likely than not, the specific area will include only the coordinator's discipline.) Thus, at the senior high school, the coordinator serves as the first line administrator responsible for the complete operation of the instructional program within his respective discipline and/or assigned area of responsibility.

The coordinator observes and evaluates an assigned professional staff according to district guidelines and procedures. In fact, the coordinator essentially accomplishes the necessary evaluations. The coordinator is to promote the use of a variety of teaching styles and strategies among professional staff. The coordinator is an instructional and curriculum leader within his assigned discipline. He works with the principal in regard to staff (he is involved in the interview process) and the scheduling of teachers within his area. A secondary subject coordinator determines the number of classes in each subject and the staffing at the high school and is directly involved in changes in the schedules of students within his discipline. The coordinator monitors and evaluates professional staff in their interaction with students and in the performance of daily routine assignments. The coordinator routinely reviews, evaluates and recommends textbooks to ensure accuracy, currentness and educational stability.

In regard to the budget, the secondary subject coordinator develops an annual budget in his assigned area of responsibility. This includes enrollment projections, facility needs, grant writing and staff needs. The coordinator is to promote participation in the district staff development program and to teach classes within his area of certification as assigned. In this vein, of the eight equal time periods in the high school, the secondary subject coordinator teachers either one, two or three periods according to the number of teachers he supervises. (If he supervises fewer than 10 teachers, he teaches three teaching periods, 10 to 17 teachers two teaching periods, and 18 or more teachers one

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teaching period.) He prepares for one period and the rest of the periods are devoted to secondary subject coordinator duties. The secondary subject coordinators evaluate all custodial staff in their area of assignment. They are the first line of student discipline at the high school. Students in need of discipline are sent from the department teachers to the appropriate secondary subject coordinator for handling. Parents are contacted and punishment is issued. In sum, the secondary subject coordinators assumed the role previously held by the assistant principal at the high school. They serve as principals within a specific assigned area. They are responsible for the operation and good order of their department and the assigned area.

In addition to responsibility at the high school, the secondary subject coordinator has middle school responsibility. As such, it is clear that the secondary subject coordinator serves as a resource to middle school administrators and staff in the capacity of a subject specialist. The coordinator meets regularly with middle school teams to ensure instructional and curricular articulation. The coordinator monitors and evaluates the classroom performance of middle school teachers if requested within his respective discipline and submits reports to the middle school principal or assistant principal. The coordinator assists the principal in the development of an annual budget relative to his assigned area of responsibility.

On a district-wide basis, the secondary subject coordinator must serve as a member of standing curriculum committees established by the assistant superintendent. He is to assist in communicating the instructional program to the community by attending board of education and other parent meetings as requested. Further, he is to ensure district-wide articulation of curriculum and instructional materials for grades 7 to 12. The coordinator position is a supervisory position requiring time and effort beyond the normal calendar year and allowing for additional compensation.

CONCLUSIONS OF LAW

Petitioner's Entitlement to Tenure

Petitioner argues that he accrued tenure as a supervisor as a result of serving in the

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position of department chairperson. Petitioner points out that as of 1979 he was required to possess a supervisory certificate in order to hold the position of department chairperson. Since he received his supervisor's certificate in May 1980, he asserts that, pursuant to N.J.S.A. 18A:28-6, he had achieved tenure in the specific position of department chairperson when it was abolished in 1986. Since he obtained tenure as a department chairperson, petitioner argues that he has greater seniority than Mr. Marchegiano to the secondary subject coordinator position. He relies on N.J.A.C. 6:3-1.10(i) for this contention.

In response, respondent argues that petitioner was not tenured in the position of department chairperson because he did not serve in a position title recognized under the endorsements on a supervisor's certificate. Furthermore, the department chairperson position was not an unrecognized position title which respondent had asked the county superintendent to approve. Thus, the position of department chairperson was not a tenurable position in which petitioner was entitled to protection. Respondent thus contends that the issue of petitioner's seniority rights need not be addressed because seniority would accrue only to a teaching staff member in a tenured position.

This tribunal has considered the arguments presented by both parties and must agree with the conclusion urged by petitioner. At the outset, this tribunal feels compelled to address respondent's argument that the position of department chairperson was not a tenurable position because the position title was not recognized under the endorsements on a supervisor's certificate.

It is clear that any teaching staff member, tenured or otherwise, employed in the public schools must be "the holder of a valid certificate to teach, administer, direct or supervise the teaching, instruction or educational guidance of . . . pupils in such public schools. . .. " N.J.S.A. 18A:26-2. Certificates are issued by the State Board of Examiners pursuant to rules and regulations prescribed by the State Board of Education. N.J.S.A. 18A:6-38. A comprehensive set of regulations, N.J.A.C. 6:11-1.1 et seq., describes the various certificates which may be issued, sets forth the requirements for obtaining a particular certificate, designates which certificates are required for which positions, prescribes requirements for teacher education programs, etc. As was clarified in Philip

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Howley and Dewey Bookholdt v. Ewing Tsp. Board of Education, OAL DKT. EDU 3664-82, (Oct. 21, 1982), aff'd Comm'r of Ed. (Dec. 20, 1982), the State Board of Examiners issues only three kinds of regular certificates, i.e., instructional, administrative and supervisory, and educational services. All other "certificates" referred to in case law are actually "endorsements" on one of the foregoing three certificates. It is clear that pursuant to N.J.A.C. 6:11-10.4, the following endorsements may be issued on a New Jersey administrative and supervisory certificate: (a) school administrator, (b) principal, (c) supervisor, (d) assistant superintendent in charge of business, and (e) school business administrator. (See also, N.J.A.C. 6:11-10.12, 10.13 and 10.14 which deal with the executive superintendent and other endorsements on the administrative and supervisory certificate.)

It is to be noted that an endorsement is not synonymous with a "position," although in some cases they may actually be the same. For example, the endorsement "principal" entitles the holder to serve in the following "positions": principal, vice-principal, assistant superintendent of schools and assistant superintendent in charge of curriculum and/or instruction. Howley at 1335. More to the point, as is clarified in N.J.A.C. 6:11-10.4, the endorsement of supervisor "is required for supervisors of instruction who do not hold a school administrator's or principal's endorsement. The supervisor shall be defined as any school officer who is charged with authority and responsibility for the continuing direction and guidance of the work of instructional personnel." In further explanation, N.J.S.A. 18A:28-1 provides: "As used in this chapter, the word 'position' includes any office, position or employment."

Every position must have a position title which is recognized in the Administrative Code. N.J.A.C. 6:11-3.6(a). The position title either corresponds to one of the enumerated endorsements, is specifically designated within the endorsement description or has been specifically approved by the county superintendent who has made a determination of the appropriate certification and title for the position. See, Howley at 1335. Thus, in the instant matter, as will be discussed herein, although the position "department chairperson" is not an enumerated endorsement, the established duties performed by petitioner fall within (is "specifically designated within") the description of the endorsement "supervisor." Clearly, petitioner as a department chairman was a

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"school officer charged with authority and responsibility for the continuing direction and guidance of the work of instructional personnel." Therefore, in the instant case, the position title of department chairperson, falling within the endorsement supervisor, is recognized in the Administrative Code and, as such, constitutes a position that is tenure eligible. It is against this backdrop that this tribunal has considered whether petitioner was tenured in the position of department chairperson.

Tenure is a statutory right which enures to all teaching staff members who meet the precise conditions of the statute. Spiewak v. Rutherford Dept. of Education, 90 N.J. 63, 77 (1982); Zimmerman v. Newark Board of Education, 38 N.J. 65, 72 (1962), cert. denied 371 U.S. 956 (1963). Generally, tenure is available to teaching staff members who work in positions for which a certificate is required, who hold valid certificates and who have worked the requisite number of years. Thus, N.J.S.A. 18A:28-5 provides that teaching staff members who hold proper certificates shall maintain tenure status after having been employed in a local school district for (1) three calendar years; (2) three consecutive academic years, with employment at the beginning of the next succeeding academic year; or (3) the equivalent of more than three academic years within a period of four consecutive academic years. Once tenure as a teaching staff member within the school district has been attained, additional tenure protection may be achieved in a specific work category. See, Keane v. Flemington-Raritan Regional School District Bd. of Ed., 1970-71 S.L.D. 162, 164.

N.J.S.A. 18A:28-6 controls this categorical tenure and provides that such protection may be obtained in a position after:

(a) the expiration of a period of employment of two consecutive calendar years in the new position unless a shorter period is fixed by the employing board for such purpose; or

(b) employment for two academic years in the new position together with employment in the new position at the beginning of the next succeeding academic year; or

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(c) employment in the new position within a period of any three consecutive academic years for the equivalent of more than two academic years . . ..

With reference to the position of department chairman, the tenured teaching staff member must be assigned to that position with full knowledge and approval of the local board and must serve, holding a board-required supervisor's certificate or its equivalent, for the period prescribed by N.J.S.A. 18A:28-6. Support for this conclusion can be gleaned from McCormick v. Hunterdon Central Regional High School District Bd. of Ed., 1978 S.L.D. 160, 169, aff'd St. Bd. of Ed., 1980 S.L.D. 157, which indicates that one way to demonstrate that a chairperson's position is tenurable is to show that the local board adopted a policy or a job description requiring supervisory certification. The petitioner in McCormick, with full knowledge and approval of the board, was assigned and required to supervise instruction. By existing board policy, he was required to be certified as a supervisor. In that capacity, he served as a tenured teacher with a supervisor's certificate for a period in excess of two years. According to the Commissioner, "(T)hat service, by statutory prescription, established him as a supervisor of instruction with a tenure status." N.J.S.A. 18A:28-6; 1978 S.L.D. at 169. The Commissioner rejected the argument that only by the board's act of conferring tenure could he gain that status. See, Zielenski v. Bd. of Ed. of Guttenberg, 1970 S.L.D. 202, reversed St. Bd. of Ed., 1971 S.L.D. 664, aff'd 1972 S.L.D. 692 (N.J. App. Div. Feb. 16, 1972) (unreported). See also, Vieland v. Princeton Regional School District Bd. of Ed., 1976 S.L.D. 892, aff'd State Bd. of Ed., 1977 S.L.D. 1308, in which the Commissioner, in determining that petitioner held tenure as director of staff services, indicated that "petitioner clearly performed supervisory duties in the period July 1, 1972 to June 20, 1975 at the direction and with the knowledge of the board. Such duties, in a full-time position were those within the parameters of the supervisor's authority. . . and they were performed with the full knowledge of the board which approved them as part of a job description." 1976 S.L.D. at 898.

Clearly, and more particularly with respect to the requirement of board approval, both the job description and the employment of a particular person in that position must

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be approved by the local board pursuant to N.J.S.A. 18A:27-1 and 18A:27-4. See, Buehler v. Ocean Tsp. Bd. of Ed., 1970 S.L.D. 436, 440-442, aff'd State Bd. of Ed., 1971 S.L.D. 660, aff'd 1972 S.L.D. 664 (N.J. App. Div. Nov. 2, 1972) (unreported). Moreover, in order for a chairperson to acquire tenure, the job description should apparently be analogous to that of some expressed category under the statute or regulations. See, Wilson v. New Brunswick Bd. of Ed., 1977 S.L.D. 555, 560 in which the Commissioner, recognizing that the title of department chairperson is not a title set forth in the tenure statute or in the relevant provisions of the New Jersey Administrative Code, Title 6, Education, found that the record failed to disclose a preponderance of evidence to support a finding that the board had knowledge of the specific duties performed by petitioner other than those of department chairperson, which it correctly assumed required no other certification than that of a teacher of social studies. Thus, the Commissioner determined that the superintendent and his administrative staff had exceeded their authority in assigning petitioner supervisory duties, notwithstanding that petitioner had acquired a supervisor's certificate issued by the State Board of Examiners. Id at 562-563. See also, Van Houten v. Middletown Tsp. Bd. of Ed., 1977 S.L.D. 984, aff'd State Bd. of Ed., 1978 S.L.D. 1044.

Further, and as discussed above, for a department chairperson to acquire tenure in that position, a certificate other than that of a teaching staff member must be held. Wilson at 562-64; Boney v. Pleasantville Bd. of Ed., 1971 S.L.D. 579, 582-584. In fact, and as alluded to above, many cases have turned on whether a supervisor's certificate was required by a local board for the position of department chairperson. See, for example, Van Houten, Wilson, Buehler. See also, Dignan v. Rumson-Fair Haven Regional High School Bd. of Ed., 1971 S.L.D. 336, aff'd State Bd. of Ed. (Sept. 11, 1974), aff'd 1975 S.L.D. 1083 (N.J. App. Div., Oct. 10, 1975) (unreported), in which the Commissioner considered whether a certificate other than that of teacher was required in order to determine whether petitioner had tenure in his extra-curricular assignment.

The prior discussion clearly shows that when a board of education has assigned an individual to a supervisory position (apparently by approving a job description which indicates such responsibility), the individual may acquire tenure in that position if he

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serves the requisite length of time and is in possession of a proper certificate. Santarsiero, et al v. Board of Education of Parsippany-Troy Hills, OAL DKT. EDU 5667-83 (March 30, 1984), adopted Commissioner of Ed. (May 14, 1984), adopted State Bd. of Ed. (Oct. 5, 1984). Tenure cannot be defeated because the board at no time considered or portrayed a position, such as department chairperson, as tenure eligible. See, Paternoster v. Borough of Leonia Bd. of Ed., OAL DKT. EDU 5989-80 (Aug. 19, 1981), reversed on remand Comm'r. of Ed. (Nov. 9, 1982), reversed State Bd. of Ed. (March 7, 1984), aff'd N.J. App. Div., April 2, 1985, A-4097-873T6 (unreported). In addition, once the statutory time period has been served in a supervisory capacity, a chairperson's tenure is not limited to a particular subject area, but rather such individual would have tenure as a supervisor generally. See, Flanagan v. Camden Board of Ed., 1980 S.L.D. 1283, aff'd Comm'r. of Ed., 1980 S.L.D. 1289, aff'd St. Bd. of Ed. (Dec. 2, 1981), aff'd N.J. App. Div., Jan. 24, 1983, A-1826-81T-1(unreported), remanded 94 N.J. 551 (1983), remanded N.J. App. Div., August 31, 1983, A-1826-81-T1 (unreported), rev'd St. Bd. of Ed. (Sept. 5, 1984).

In the instant case, petitioner was clearly assigned to the position of department chairperson with the full knowledge and approval of the local board. Likewise, there was a formally adopted job description outlining the duties of a department chairperson (PA-7). Those duties were sufficiently supervisory in nature to place petitioner within a category in which he could obtain tenure. While the job description failed to give a specific certification requirement and, in fact, respondent could not find any official record to establish a requirement that department chairpeople must hold supervisory certification, the undisputed testimony elicited at the hearing indicated that a supervisor's certificate was required at some time in 1979 or 1980. In fact, it seemed apparent to all that if a department chairperson was to assist in the supervision of instruction and evaluation of teachers, the chairperson was required to hold an administrative or supervisory certificate. In sum, tenure status has accrued to petitioner because he served at the direction of the board for the requisite period, functioned as a supervisor at the direction of the board, and had administrative and supervisory certification with the requisite endorsement.

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Petitioner's Entitlement to the Position of Secondary Subject Coordinator

Based on the facts outlined above, petitioner states that although the position of department chairperson was abolished, there presently exists the newly created supervisory position of secondary subject coodinator, and he claims to be entitled to this position. It is apparently petitioner's contention that the position of secondary subject coordinator requires the performance of duties substantially similar or identical to those previously performed by the department chairperson, petitioner. More particularly, it is petitioner's view that in reality the duties inherent in the mathematics secondary subject coordinator job description are virtually indistinguishable from those performed by petitioner as department chairperson. Petitioner perceives the only differences to involve custodial and disciplinary responsibilities. Petitioner asserts that it is not necessary for each and every duty to have been transferred in toto from the old to the new in order to sustain a claim that the new position indeed encompasses duties inherent in the old. Rather, petitioner asserts that if the essential duties of the old position are indeed an integral part of the new position, then petitioner has demonstrated that his seniority rights have been violated.

In contrast, respondent urges that the position of department chairman is substantially different from the newly created position of secondary subject coordinator and, accordingly, petitioner can claim no entitlement to the coordinator position. In support of its position, it cites Jablonski v. Emerson Bd. of Ed., OAL DKT. EDU 6812-82 (March 2, 1983), aff'd Comm'r. of Ed. (April 18, 1983), aff'd St. Bd. of Ed. (July 6, 1983), aff'd N.J. App. Div., March 6, 1984, A-A6100-81-T2, (unreported), in which the question at issue was whether a new position created by the board required responsibilities substantially identical with the position and responsibilities of the previous position. Respondent essentially argues that petitioner failed to establish that the position of department chairperson and secondary subject coordinator are "substantially identical" as required by Jablonski. It is respondent's belief that the positions differ in terms of responsibility, scope of function, line of authority, salary and release time.

In reaching a determination on this issue, I must agree with the petitioner that the

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question of whether Hatt's service and tenure in the position of department chairperson can be applied to the newly created position of secondary subject coordinator for math depends upon whether the duties performed in both positions are substantially the same. In effectuating a reorganization plan, which may entail the elimination of positions in favor of the consolidation and creation of new positions, the board must take into account the tenured status of the affected teaching staff members. See, N.J.S.A. 18A:28-9. In order to protect the seniority and tenure rights of a teaching staff member when a board reorganization plan has been undertaken, it is necessary not only to examine the job description of the newly created position but, more important, to evaluate the actual duties performed by affected teaching staff members in order to determine eligibility for the newly created position. See Christie v. Bd. of Ed. of the City of East Orange, OAL DKT. EDU 6535-84 (Jan. 18, 1985), aff'd Comm'r. of Ed. (March 11, 1985), wherein the Commissioner held that:

> It is unquestioned that a board of education has the right to abolish a position whenever in its judgment it is advisable. . . In determining an individual's tenure and seniority rights, it has been clearly established that the employment must be viewed in terms of the actual duties performed under the certificate required. Thus, the duties performed, rather than the title of the position or the job description, are controlling; one must look to the substance rather the form. Id at 14.

See also, Figurelli v. Bd. of Ed. of Jersey City, OAL DKT. EDU 2003-86 (Oct. 28, 1986), aff'd Comm'r. of Ed. (Dec. 12, 1986), aff'd St. Bd. of Ed. (May 5, 1987); Flood v. Bd. of Ed. of Jersey City, OAL DKT. EDU 2290-86 (Nov. 10, 1986), aff'd Comm'r. of Ed. (Dec. 22, 1986); Smith v. Bd. of Ed. of Jersey City, OAL DKT. EDU 7666-85 (Dec. 19, 1986), aff'd Comm'r. of Ed. (Feb. 4, 1987), aff'd St. Bd. of Ed. (Nov. 6, 1987).

It is thus apparent that the threshold question which the board must face when creating a new position pursuant to a reorganization plan is whether the duties performed in the new position are substantially similar to the duties performed in the position abolished.

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With this backdrop, this tribunal has looked to Rufalo v. Bd. of Ed. of the Tsp. of Livingston, OAL DKT. EDU 3760-85 (May 20, 1986), aff'd Comm'r. of Ed. (July 1, 1986). In Rufalo, the administrative law judge held that it was inevitable that some duties of the abolished position would be performed in the new position of supervisor. It was determined, however, that the important distinction between the abolished vice-principal position and the new position of supervisor was that the supervisor position held greater duties and responsibilities than the abolished vice-principalship position. Similarly, in Santarsiero, it was observed by this judge that mere overlap of some duties does not make positions identical and the difference between the positions was not merely quantitative. See also, Jablonski v. Emerson Bd. of Ed., wherein the administrative law judge determined that Jabolonski's seniority and tenure rights were not violated when he was not employed as the administrative assistant to the high school principal because that position was not substantially the same in duties or in title to the position and responsibility he held as director of guidance. Cf., Christie v. Bd. of Ed. City of East Orange, wherein the administrative law judge concluded that the reporting relationships and the core of the jobs duties were the same; the only difference between the two positions was the titles.

It is therefore clear that if it is found that the duties performed by petitioner as department chairperson are substantially similar to the duties performed in the new position of secondary subject coordinator, then petitioner's seniority in the position of department chairperson could be counted towards the position of secondary subject coordinator. Since petitioner's claim to the new position of secondary subject coordinator rests on a theory of identity between the two positions, it behooves this tribunal to compare the two positions in an effort to determine whether the duties performed in both positions are substantially similar. In so doing, this tribunal notes that although both positions involve some supervisory functions, the duties of secondary subject coordinator differ from, and are greater than, the duties of department chairperson. At the outset, it must be observed that respondent correctly points out that the administrative reorganization which involved the abolishment of department chairman positions and the creation of secondary subject coordinator positions was district-wide. In fact, the position of the supervisory association concerning the creation of the position of

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secondary subject coordinator was that the duties and responsibilities of this position are different from those of department chairperson. The association therefore requested that contract negotiations be reopened to address the contractual ramifications of these newly created positions (R-1). As was stated by president Spencer L. Tracey by letter dated March 24, 1987, "new middle management positions were created for the purpose of promoting a sounder educational program." The "conditions of employment" were unquestionably changed. . . we have done our "new jobs" with their added responsibilities . ..." In sum, the association representing the coordinators fully realized that the secondary subject coordinator position was different from that of the former department chairman position. It is the view of this tribunal that the position of the association and of the respondent is correct.

Clearly, the secondary subject coordinator's position involves a great deal more supervisory tasks on a larger scale than the position of department chairperson. It is the view of this tribunal that service in the building-based position of department chairperson is different from service in the new position of secondary subject coordinator, which requires responsibility for grades 7 to 12. As is apparent from a review of the facts outlined with specificity above in regard to the two positions at issue, in comparison with the secondary subject coordinator position, the supervisory functions of a department chairperson were minimal on a quantitative scale. The fact of the matter is that department chairpersons were primarily teachers who expended the majority of their assigned time teaching and the remainder performing department chairperson tasks. A department chairperson had as his basic function the responsibility to assist a building principal in supervising the instruction and evaluation of teachers. In contrast, the position of secondary subject coordinator is a middle level administrative position which has as its goal responsibility for the administration, supervision and evaluation of all programs and services within its respective discipline. The secondary subject coordinator has responsibility for curriculum, budget and staffing for grades 7 to 12. In fact, a coordinator has responsibility for discipline, observation and evaluation, curriculum and budget on a level substantially greater than that required of a department chairperson.

In sum, the position of the department chairman was primarily a teaching position

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with relief time for certain defined supervisory tasks. The position of secondary subject coordinator involves a great deal more supervisory tasks on a larger scale. The difference in degree of responsibility is so great as to render the two positions markedly dissimilar despite the fact that the two positions may have at times required similar duties.

Based on the foregoing discussion and findings of fact, I **CONCLUDE** that petitioner has acquired tenure in his position as department chairperson. However, I **CONCLUDE** further that inasmuch as the position of department chairperson is not substantially similar to the position of secondary subject coordinator, petitioner is not entitled to be appointed to the newly created position of secondary subject coordinator for mathematics.

ORDER

Accordingly, it is hereby **ORDERED** that petitioner be afforded tenure in the position of department chairperson in accordance with this opinion. It is **FURTHER ORDERED** that petitioner's claim for entitlement to the position of secondary subject coordinator is **DENIED**, and in that regard petitioner's appeal is **DISMISSED WITH PREJUDICE.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

May 23, 1988
DATE

Elinor R. Reiner
ELINOR R. REINER, ALJ

MAY 24 1988
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

MAY 25 1988
DATE

Mailed To Parties:
FOR OFFICE OF ADMINISTRATIVE LAW

jp

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GEORGE HATT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law.

Petitioner's exceptions to the initial decision, as well as the Board's reply to those exceptions, are deemed to have been filed pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

In reviewing petitioner's exceptions to the initial decision, it is clear that he takes issue with the ALJ's finding and conclusion which holds that petitioner's former position as department chairman and the newly created position of secondary subject coordinator are subtantially distinguishable.

In this regard, petitioner rejects that finding by attempting to establish that the record of this matter reveals that these controverted positions are, for all intents and purposes, the same.

In this regard petitioner relies on those facts contained in the record in support of his claim to the position of secondary subject coordinator for mathematics:

1. Petitioner received permanent certification as a teacher on July 10, 1957. He also received his principal/supervisor's certification in May 1980.

2. Petitioner acquired tenure as a supervisor while serving in the position of mathematics department chairman.

3. Petitioner maintains that the documents in evidence, as well as the testimony contained in the record of this matter, reveal that the duties contained in the job description of mathematics department chairman (PA-7) conform to those adopted by the Board for the position of secondary subject coordinator (PA-12) for mathematics.

Petitioner argues in his exceptions as follows:

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> The sole responsibilities performed by the coordinator which were not performed on a regular basis by Petitioner rest with the coordinator's disciplinary and custodial duties. To rely upon these ancilliary (sic) and ministerial duties as a basis for wresting the coordinator position from Petitioner is to ignore the primary thrust of both the coordinator's duties and the duties performed by Petitioner for thirty years. Indeed, the focal points of the coordinator's responsibilities are his administrative, supervisory, and evaluative functions. It cannot be denied, and indeed the testimony was uncontroverted, that Mr. Hatt performed these identical tasks both within his assigned building and throughout the District. Since it is the job duties which govern the entitlement to a particular position it is manifestly clear that Mr. Hatt is entitled to the position of Secondary Subject Coordinator. Indeed, given the fact that he has acquired tenure as a Department Chairperson and has greater seniority rights than the current holder of the coordinator position, and given the uncontroverted testimony of his varied duties within the District over the course of the years, the Initial Decision denying him that position is without basis both in law and in fact. (Capodilupo vs. West Orange, Tp. Bd., 218 N.J. Super. 510 (App. Div. 1987).)
>
> (Petitioner's Exceptions, at pp. 8-9)

The Board, in rejecting petitioner's arguments made by way of his exceptions, maintains that the primary issue in this case is whether the positions of department chairman and secondary subject coordinator are substantially distinguishable so as to defeat petitioner's seniority claim to the latter position. The Board further avers that petitioner never acquired tenure or seniority in the position of department chairman and for that reason his reliance on Capodilupo is misplaced. It is for this reason the Board contends that petitioner has erroneously relied on Capodilupo, supra, and its progeny. See also Bednar v. Westwood Board of Education, 221 N.J. Super. 239 (App. Div. 1987) which deals with the narrow question of the rights of a tenured teaching staff member who has been terminated to assert a claim to a position over a nontenured teaching staff member who has been retained in employment while holding the same certification and endorsement.

Moreover, the Board rejects petitioner's argument to the effect that there is little or no distinction between the job description or duties of department chairman (PA-7) and secondary subject coordinator (PA-12) by in part relying upon those findings of the ALJ set forth in the initial decision which hold as follow:

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> In sum, the position of the department chairman was primarily a teaching position with relief time for certain defined supervisory tasks. The position of secondary subject coordinator involves a great deal more supervisory tasks on a larger scale. The difference in degree of responsibility is so great as to render the two positions markedly dissimilar despite the fact that the two positions may have at times required similar duties. (Initial Decision, ante)

Finally, the Board maintains that:

> Although it is seemingly true that a point-by-point analysis of the specific functions of each of the positions in question is useful in determining their similarities and differences, such an analysis must also take into account the fact that the whole is qualitatively greater than the sum of its parts, particularly when taking into account the entire reorganization of the system at the secondary level. The district's secondary structure changed from one three year high school (grades 10-12) and two three year junior high schools (grades 7-9) to one 4 year high school (grades 9-12) and one two year middle school (grades 7 and 8). Thus, despite a number of overlapping duties and similarities, it is respectfully submitted that the SSC position is substantially greater in scope, depth, purpose and effect than the obsolete department chairmanships (DC). The SSC is, in effect, a districtwide supervisor, whereas the DC was building-based. The SSC is the first-line student disciplinarian; the DC played no such role. The SSC is responsible for the physical climate and cleanliness of his/her portion of the school plant; the DC did not have this responsibility. The SSC initiates curriculum changes and instructional goals; the DC simply received and implemented them. The SSC is held accountable for instructional excellence, the teachers' and the students'; the DC's were not.***
> (Board's Reply Exceptions, at p. 6)

The Commissioner has reviewed the respective positions advanced by the parties with regard to the findings and conclusions set forth in the initial decision.

In reaching a final determination in this matter, the Commissioner notes that the ALJ in the initial decision, ante, has made the following statement:

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> Generally, tenure is available to teaching staff members who work in positions for which a certificate is required, who hold valid certificates and who have worked the requisite number of years. (emphasis supplied)

The Commissioner finds that the use of the word "generally" herein is misleading and inappropriate inasmuch as the provisions of N.J.S.A. 18A:28-5 are a statutory mandate and therefore require that specific tenure protection he afforded to teaching staff members in every instance upon compliance with the certification provisions and length of employment service contemplated by these provisions of law without exception.

The Commissioner, however, finds and determines that petitioner's reliance upon Capodilupo, supra, to assert a tenure and seniority claim to the position of secondary subject coordinator of mathematics is inapposite and distinguishable inasmuch as there is no evidence in the record which disputes the fact that the person who is currently employed as secondary subject coordinator of mathematics has also achieved tenure as a supervisor in his previous position as department chairman.

Upon review of the record, the Commissioner is not persuaded by the arguments advanced by petitioner that a reversal of the findings and conclusions set forth in the initial decision is warranted. In this regard, the Commissioner finds and determines that while petitioner has acquired tenure in the position of department chairman, it is further determined that petitioner is not entitled to lay a tenure or seniority claim to the newly created position of secondary subject coordinator of mathematics established by the Board. This finding and determination is predicated upon the fact that the position of secondary subject coordinator is distinguishable and much broader in scope than the former position of department chairman as evidenced by the exhibits in the record and the relevant findings with respect to the testimony of witnesses reported in the initial decision.

Accordingly, the Commissioner finds and determines that petitioner's claim to the tenure and seniority rights in the position of secondary subject coordinator of mathematics is without merit and is hereby dismissed.

COMMISSIONER OF EDUCATION

July 11, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8826-86
AGENCY DKT. NO. 375-11/86

NEPTUNE TOWNSHIP EDUCATION ASSOCIATION,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,
Respondent.

Stephen B. Hunter, Esq., for petitioner (Klausner, Hunter and Oxfeld, attorneys)

Donald L. Beekman, Esq., for respondent (MacDonald, Beekman and Missett, attorneys)

Record Closed: March 4, 1988 Decided: May 27, 1988

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

STATEMENT OF THE CASE

Petitioner, Neptune Township Education Association (Association) brings this action before the Commissioner of Education (Commissioner) pursuant to N.J.S.A. 18A:6-9 on behalf of four substitute teachers employed by the Board of Education of the Township of Neptune (Board) on a permanent basis. Subsequent to the Board's action to terminate the four substitute teacher positions for reason of economy, the Association claims that the Board has failed to comply with the provisions of N.J.S.A. 18A:29-5, known as the "Teacher Quality Employment Act" with regard to the permanent teacher

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salaries for the 1985-86 school year and the 1986-87 school year from September 1, to November 14, 1986, the date of their termination.

PROCEDURAL ASPECTS

Subsequent to issue having been joined, the Commissioner, on December 19, 1986, transmitted the matter to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. Thereafter, a prehearing conference was conducted at which, among other things, the parties agreed to hold the instant matter in abeyance until an appeal before the Superior Court, Appellate Division is resolved in the matter of Rumson-Fair Havan Education Association and Brad Wilbur v. Board of Education of the Rumson-Fair Haven Regional School District (1986 S.L.D. ____ decided September 16, 1986, rev. State Board of Education, August 7, 1987). Consequently, an Order for Admission to the OAL Inactive List was issued on February 13, 1987, and renewed on June 23, 1987 and September 28, 1987, for terms of three months each. At the expiration of the term for the third admission to the inactive list it was determined to proceed to hearing in the absence of the Appellate Court's determination in the Rumson matter.

The hearing was held on January 11, 1988 at the Manalapan Municipal Court. The parties requested and were granted leave to submit posthearing memoranda the first of which was received by the OAL on March 4, 1988 which constitutes the closing date of this matter.

FINDINGS OF FACT

Based upon the testimony adduced at the hearing together with the documents submitted into evidence, I have given fair weight to the proffered evidence and **FIND** the following **FACTS:**

1. On or about August 14, 1985, the Board passed and adopted a resolution at an open public meeting to appoint three individuals as permanent per diem substitute teachers for the 1985-86 school year (J-1).

2. On the same date, August 14, 1985, the Board advertised for the position of permanent substitute teacher (certified) (J-2).

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3. On October 30, 1985, Thomas Blackwell was approved by the Board to the appointment as permanent substitute per diem teacher, effective November 1, 1985 (J-3).

4. Thomas Blackwell was certified in the area of Health and Physical Education and assigned as a permanent per diem substitute teacher at the Board's Junior High School (J-2).

5. Helene Downey, who holds certification in the field of Home Economics, was one of the three original appointees in August 14, 1985 and was assigned as a permanent per diem substitute at the Board's High School (J-1).

6. The permanent per diem substitute teachers were subjected to the Board's policy No. 3036 concerned with substitute Teacher Job Description which encompassed qualifications, duties and responsibilities (J-6).

7. The Board did not enter into a formal contractual relationship with the four appointed permanent per diem substitute teachers.

8. The permanent per diem substitute teachers were paid at the rate of $45 per diem.

9. The permanent per diem substitute teachers were required to report for duty on a daily basis and were assigned to substitute teach in subject areas outside of their certification for absent regular teaching staff members.

10. The permanent per diem substitute teacher typically followed the lesson plan established by the absent regular teacher and followed the daily schedule of the absent teacher.

11. The daily schedule of an absent regular teacher might include the duty assignment of supervision of the cafeteria and/or study hall which would be carried out by the permanent per diem substitute teacher.

12. The high school permanent per diem substitute teachers were required to attend all faculty meetings throughout the school year, however, the junior high school permanent per diem substitute did not attend faculty meetings.

13. There is no credible evidence on this record to demonstrate that any permanent per diem substitute teacher was assigned to substitute for an individual teacher for 20 consecutive days or more.

14. In the event the permanent per diem substitute teacher was required to replace a regular teaching staff member for an extended period of time, but less than 20 continuous days, the substitute would be responsible for daily lesson plans, grading

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of pupil papers and the maintenance of records, among other things (J-6, p. 2, item 10).

15. Permanent per diem substitute teacher Helene F. Downey accepted the assignment after performing for 14 years as a day-to-day substitute teacher.

16. Ms. Downey did not consider herself to be a regular classroom teacher but, rather, a substitute for the regular classroom teacher.

TESTIMONIAL EVIDENCE

Helene P. Downey, one of the four permanent per diem substitute teachers formerly in the Board's employ, testified, among other things, that she was certified as a teacher of Home Economics and that she was employed only as a substitute by the Board. She appeared at the Board's high school on a daily basis and took her daily assignment from the vice principal to either substitute for an absent teacher or assume some other assignment. She asserted that she almost always performed substitute teaching duties because hardly a day passed where she did not have at least one absence to cover. She asserted that there were certain advantages to her assignment as a permanent substitute as opposed to the on-call day-to-day substitute; i.e., the pupils were acquainted with the permanent substitute teacher and were aware of his or her expectations.

Ms. Downey testified she accepted the permanent substitute teaching position after serving approximately 14 years as a day-to-day substitute. She prefers the substitute work more than a permanent teaching assignment and the permanent substitute position eliminated the daily uncertain call to work.

Ms. Downey testified extensively concerning her substitution for Ms. Meade, a teaching staff member who was undergoing periodic treatments for cancer. Ms. Meade was a teacher of English whose daily schedule for the 1985-86 school year included: Home Room, one period of Senior English, four periods of Sophomore English, one period of hall duty, one period for lunch and one preparation period. On direct-examination, Downey asserted that she had substituted for Ms. Meade every Friday afternoon from September 1985 to June 1986 except for three (3) such Fridays. Downey also testified on direct that she substituted for Ms. Meade for a full week or longer during the weeks of April 14, 21, 28, 1986 and the week of May 5, 1986 (Exhibit P-1). Downey asserted that she graded pupils papers and made her own lesson plans when she substituted for Ms. Meade for

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extended periods of time. Ms. Downey admitted she was not certified in the area of English, therefore, she could not have replaced Ms. Meade for the remainder of the school year (beyond 20 days).

On cross-examination, Ms. Downey admitted she was in error when she testified on direct that she had substituted for Ms. Meade every Friday except three during the 1985-86 school year. Downey's own records demonstrate she did not substitute for Ms. Meade for whole days on Fridays and, further, that she did not substitute for Ms. Meade every Friday except for three days in the 1985-86 school year (Exhibits P-1 and P-2).

Ms. Downey also contradicted her direct testimony with respect to her assertion that she substituted for Ms. Meade the full weeks of April 14, April 21, April 28 and May 5, 1986. The record demonstrates that Downey did not substitute for Ms. Meade every day from April 14 to April 30, 1986. Downey's records show that she did not substitute for Ms. Meade for a period of 20 continuous days or more (Exhibits P-1 and P-2).

Thomas Blackwell, a permanent substitute per diem teacher assigned to the junior high school from November 1985 to November 1, 1986, testified that he substituted for a special education teacher on a continuous assignment from March through late April 1986. Blackwell had no records or documents to support his assertion. Blackwell's testimony was rebutted by Edward Torres, junior high school vice principal whereby he testified that another teacher was assigned to the special education class prior to Blackwell's assignment. Torres also asserted that no permanent substitute teachers were ever assigned in excess of the 20 day limit.

Daniel Edelson, vice principal at the Board's senior high school, testified regarding the maternity leave of absence of Patricia Mixson, a teacher of Spanish. The Board, at its March 26, 1986 open public meeting, approved Mrs. Mixson's leave beginning April 1, 1986 to June 15, 1986 (Exhibit P-3). The Board's personnel records for Mrs. Mixon shows, however, that her maternity leave of absence to be from May 1, 1986 to June 15, 1986 (Exhibit R-1). In any event, Edelson asserted that due to the difficulty of obtaining a fully qualified Spanish teacher at this time of the year to complete Mrs. Mixson's assignment, Mrs. Mixon video-taped the daily lessons for presentation to the pupils assigned to her class. Edelson, therefore, assigned permanent per diem substitute teacher

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Susan Ryan to monitor the Mixson classroom and be responsible for the class attendance only. Ryan did not conduct any classroom instruction during Mixon's absence.

LEGAL ARGUMENT OF THE PARTIES

PETITIONER'S ARGUMENT

At Point One in its argument, petitioner asserts that permanent substitute teachers employed by the Board during the 1985-86 and 1986-87 school years were entitled to the minimum salary specified within the Teachers Quality Employment Act (Act). N.J.S.A. 18A:29-5 et seq., which provides, in pertinent part, as follows:

> The minimum salary of a full-time teaching staff member in any school district who is certified by the local board of education as performing his duties in an acceptable manner for the previous academic year . . . and who is not employed as a substitute on a day-to-day basis shall be $18,500 for the academic year and a proportionate amount for less than an academic year. (emphasis added)

The petitioner observes that the Act also provides at N.J.S.A. 18A:29-5.2 as follows:

> The Legislature finds and declares that: (a) attracting and retaining the most able individuals to the profession of teaching is critical to the future welfare of our State and our citizens; (b) the starting salary levels for new teachers have fallen significantly behind the starting salaries paid to other recent college graduates; and (c) a competitive starting teacher salary is an additional means of attracting and retaining outstanding individuals in the teaching profession. (emphasis added)

A. THE ACT'S REQUIREMENTS ARE SATISFIED

From review of these sections, petitioner argues it is clear that the Act is remedial legislation, enacted by the Legislature to ameliorate what it perceived to be a serious problem, and also that the language of the Act is clear and unambiguous. Since the Act is remedial legislation, it is to be liberally construed. Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63, 74-75 (1982); Barnes v. Jersey City Bd. of Ed., 85 N.J. Super. 42, 45 (App. Div. 1964) (both recognizing that tenure legislation, since remedial in nature, is to

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be liberally construed). Geller v. TPAF, 53 N.J. 591, 597-598 (1969) (applying same principle to pension legislation).

Here the Commissioner must construe an exception to the Act (the day-to-day substitute exception). That exception, since contained within remedial legislation, is to be strictly, although reasonably, construed. See Service Armament Co. v. Hyland, 70 N.J. 550, 556 (1976). Furthermore, the remedial aim of the Act is not simply to attract new teachers, but also to retain teachers, and the Act by its plain language applies both to new teachers and teachers employed prior to its passage.

In the instant matter, the Board maintains that four certified teachers designated as permanent substitute teachers and employed for an entire school year pursuant to Board resolution are not covered by the Act. The Board's contentions are clearly wrong. The permanent substitute positions in this case are annual positions established by Board resolution. The persons holding this position were required to report to work each day and were not employed on a day-to-day basis. They worked the same workday and workweek as other full-time teaching staff members, taught from lesson plans which were prepared by the permanent substitutes during those periods where they replaced classroom teachers on a long-term basis, i.e., for longer than twenty (20) consecutive days; attended faculty meetings and performed duty assignments such as cafeteria supervision.

It is averred that the prescriptions of the Teacher Quality Employment Act that relate to qualifying for the minimum salaries specified in that Act have clearly been satisfied by the affected permanent substitutes in the instant matter. This Act imposes three simple requirements. These requirements are satisfied by permanent substitutes, at least of the type involved in this litigation. These requirements are:

a) full-time employment
b) teaching staff member status
c) that employment not be on a day-to-day basis.

Applying these criteria, first it is undisputed that the affected permanent substitutes are employed on a full-time basis by Board resolution, thus satisfying the first of the three criteria. Second, the term "teaching staff member" is defined at N.J.S.A. 18A:1-1 as a member of the professional or teaching staff holding a position for which a

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certificate is required. Since permanent substitutes in Neptune Township are required to hold teaching certification, this section of the statutory criteria is satisfied (Exhibit P-2).

The third and final criterion is that employment not be as a substitute on a day-to-day basis. This language is also clear and unambiguous. The exception applies to teachers who serve as per diem substitutes, i.e., on a day-to-day basis. By definition, permanent substitutes are not day-to-day substitutes, employees on an on-call basis or similar arrangement. They are permanent substitutes, employed for the entire school year, and required to report to school each day.

In these circumstances, the answer to the issue in this case is clear. The statutory language is clear and unambiguous, i.e, that permanent substitutes with the responsibilities as delineated in the instant matter, fit within the mandated coverage of the Act and not within the statutory exception applicable to day-to-day substitutes. Therefore, permanent substitutes must be deemed covered by the Act. Irrespective of Respondent's position, the legislature has spoken. Because the legislature has spoken in a clear and unambiguous manner, the Court must consture the statute as written. Spiewak, supra, at p. 74. In re Jamesburg High School Closing, 83 N.J. 540 (1980).

The above conclusion is also supported by the logic of the situation. There are significant distinctions between day-to-day substitutes and permanent substitutes. A day-to-day substitute often works on a sporadic basis, i.e., on call. A day-to-day substitute is not required to report to work if called and thus does not evince as firm a commitment to the teaching profession as a permanent substitute. As section 2a of the Act suggests, the key legislative concern was attracting and retaining able individuals to the teaching profession. A per diem substitute is not necessarily committed to teaching as a career, and could thus logically be excluded from Act's coverage. Moreover, a day-to-day substitute, since not expected or required to report each day, may often have another career or source of income so that exclusion from the Act's coverage is not unreasonable.

Contrasted with the above is the situation of a permanent substitute within the Neptune Township School District. These permanent substitutes had no discretion; they must report to work each day. Permanent substitutes in Neptune were appointed for an academic year and made commitments to their employer that a day-to-day substitute does not make. These permanent substitutes because of the nature of the position, were dependent on this job for their essential livelihood, unlike day-to-day substitutes. Finally,

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as evinced by the Petitioner's witnesses, the permanent substitutes in Neptune were firmly committed to teaching as a career. It may, therefore, be seen that there is a very logical reason why day-to-day substitutes are included. That reason is consistent with the nature of the positions and legislative goal.

B. THE STATE BOARD OF EDUCATION'S DECISION IN RUMSON-FAIR HAVEN IS NOT DISPOSITIVE OF THE ISSUES RAISED IN THE PENDING MATTER

As noted in the general introduction of the post-hearing brief submitted on behalf of the Petitioner, the parties to this proceeding disagree with regard to the applicability of the State Board of Education's decision in Rumson-Fair Haven Education Assn. & New Jersey Education Assn. v. Board of Education of the Rumson-Fair Haven Reg. School District, 1987 S.L.D. ____ (decided by State Board 8/5/87). It is acknowledged that the State Board of Education reversed the Commissioner of Education's decision in this matter, which essentially would have found that all permanent substitutes employed on an annual basis were subsumed within the prescriptions of the Teacher Quality Employment Act. However, petitioner maintains that the Rumson-Fair Haven decision, which is presently pending before the New Jersey Superior Court, Appellate Division, did not dispose of the contentions raised by the Association in the instant matter.

A review of the Rumson-Fair Haven decision establishes that the State Board considered the following facts that were revealed in the Stipulations submitted to the State Board of Education in the Rumson-Fair Haven matter:

1. The utilization of substitute teachers, whether per diem or permanent, in the Rumson-Fair Haven School District indicated that this employment was not of a character that required an individual to hold a valid standard provisional or emergency certificate.

2. The individual or individuals employed as permanent substitute teachers within the Rumson-Fair Haven School District did not serve for more than twenty consecutive days in the same position, thus indicating that their status was more akin to that of a per diem substitute.

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3. Permanent substitutes, as utilized within the Rumson Fair Haven School District, were not responsible for providing instructional services to students on a regular basis and were not responsible at all for lesson plans in any curriculum area, homework, testing or grading.

In consideration of the facts, as summarized in the Statement of Facts section of this Brief, it is respectfully averred that permanent substitutes, as utilized within the Neptune Township School District, provided employment as teachers of a character that required the permanent certification as teaching staff members that they possessed. Moreover, the testimony revealed that at least three of the four affected permanent substitute teachers during the 1985-86 school year, Suzanne Ryan, Helene Downey, and Thomas Blackwell were assigned for periods in excess of twenty consecutive days[1] to a particular class and that the permanent substitutes, as utilized within the Neptune Township School District, did have responsibilities, especially during the periods of long-term assignments to a particular class, concerning the preparation and implementation of lesson plans and involvement in all related areas, including grading and testing responsibilities.

For all of the reasons set forth in this brief, and in light of the facts presented to the Administrative Law Judge in this matter, it is respectfully averred that the Rumson-Fair Haven State Board of Education decision is not dispositive of the issues raised in this matter, especially in light of a very recent Commissioner of Education decision, on remand, Eugene Williams v. Board of Education of the City of Orange, 1987 S.L.D. ____ (decided 12/30/87), a copy of which is annexed hereto. This Williams decision is analyzed in the following subsection of this brief.

C. THE APPLICABILITY OF THE EUGENE WILLIAMS/CITY OF ORANGE DECISION

In the Williams decision, the Commissioner of Education distinguished the aforementioned Rumson-Fair Haven State Board of Education decision by concluding, in part, that the Rumson-Fair Haven analysis with regard to the designation of an individual as a permanent substitute was inapplicable in situations where the facts revealed that a

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[1]Petitioners failed to affirmatively establish this assertion as true in fact. Consequently, this tribunal found that the credible evidence was lacking to demonstrate that any one of the four permanent per diem substitute teachers was assigned to any classroom for any classroom for any individual teacher for 20 consecutive days or more (See: Findings of Fact, No. 13).

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particular individual occupying that position was employed for a period in excess of twenty consecutive days in the same position. The Williams decision clearly establishes that each case raising the applicability of the Teacher Quality Employment Act to permanent substitutes must be decided on a case-by-case basis with substantial deference being accorded to a local Board of Education's actual utilization of the permanent substitute or substitutes involved.

As noted before in this brief, the permanent substitutes employed within the Neptune Township School District had substantial traditional educational responsibilities that paralleled the responsibilities of full-time classroom teachers. In instances involving teachers Downey, Ryan and Blackwell, they were responsible for instruction vis-a-vis one particular class for periods in excess of twenty consecutive days and had substantial instructional responsibilities throughout their period of employment, even when they were assigned to a series of classroom assignments within a particular time period. None of the permanent substitute teachers employed within the Neptune Township School District during the 1985-86 and 1986-87 school years functioned as babysitters. Their actual performance was more closely aligned to that of full-time classroom teachers than per diem substitutes employed by the Board of Education.

Petitiners arguments at Point Two are not entertained here due to this tribunal having found that petitioners failed to prove, by a preponderance of the credible evidence, that any of the permanent per diem substitute teachers worked 20 consecutive days in substitution for or replacement of an absent regular teacher staff member during the 1985-86 and 1986-87 school years. Petitioner's argument, in sum, at Point Two, contends that the permanent substitute teachers employed during the 1985-86 and 1986-87 school years must receive the benefits of the Act for the periods of time they replaced a teacher who was on a leave of absence for greater than 20 days, even if the Rumson-Fair Haven State Board of Education decision is deemed applicable to the instant matter.

I **CONCLUDE**, therefore, that this argument is without merit and is hereby **DISMISSED.**

THE BOARD'S ARGUMENT

The Board argues that the permanent substitute teachers employed by it during the 1985-86 and 1986-87 school years were not entitled to the minimum salary

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specified within the Act. It contends that the operative language of the Teacher Quality Employment Act, for the purpose of the instant matter, is as follows:

"Who is not employed as a substitute on a day-to-day basis"

The intent of the legislature in enacting the $18,500 legislation was to attract and retain the most able individuals to teaching positions, not as substitute teachers as clearly indicated by the exception to legislation.

The three requirements of the Act are clearly not present when analyzing the duties and functions of the permanent per diem substitutes. There was full time employment, though not under contract, but certainly they were not given the status of a teaching staff member and they were assigned on a day-to-day basis. The very nature of the classification of these four substitutes as permanent per diem substitutes excepts them from the legislation.

In the only case relative to the question set forth in this litigation, Rumson-Fair Haven Education Assocation & New Jersey Education Association v. Board of Education of the Rumson-Fair Haven Regional School District, 1987 S.L.D. ____ (decided 8/5/87) the State Board of Education clearly and unequivocally answered the question by stating that "permanent substitutes . . . are not teaching staff members" and therefore, not entitled to the benefits of the Act.

To argue, as petitioner does, that the Rumson case will be overturned by the Appellate Division is pure speculation and not to be considered in rendering a decision in the instant matter. The facts and circumstances as outlined in this case are identical to the Rumson case. As set forth by the Administrative Law Judge, "a substitute is a substitute" and as such excluded from the Act.

The Board, therefore, requests that the prayers of the Petitioners be denied in all respects for the reasons set forth.

DISCUSSION AND CONCLUSIONS

It is first necessary to address petitioners's argument that the decision of the State Board of Education in the Rumson-Fair Haven matter is not dispositive of the issues

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raised in the instant matter. Petitioner would have this tribunal ignore or, even worse, reject the State Board's determination, a matter duly adjudged, which is on all fours with the herein matter. Notwithstanding that the Rumson-Fair Haven matter is presently on appeal before the Superior Cour, Appellate Division, petitioner would have us speculate as to its ultimate outcome and predict the result in petitioner's favor. This I cannot nor will not do. I **CONCLUDE,** therefore, that the State Board's decision in Rumson-Fair Haven is the present state of the law in New Jersey with regard to the application of N.J.S.A. 18A:29-5 et seq. to permanent per diem substitute teachers in the employ of a local board of education. Therein, the state Board by way of its analysis of the statute said, in pertinent part:

> . . . we conclude that employment as a "permanent substitute" is not employment as a teaching staff member, and therefore we find that "permanent substitutes" employed by the Board are not entitled as a matter of law to the benefits conferred on teaching staff members by N.J.S.A. 18A:29-5. (Slip op. at 11).

Having reached this conclusion, I further **CONCLUDE** that it is not necessary to address the remaining arguments advanced by petitioners; i.e., the satisfaction of the Act's requirements, the applicability of the Williams v. Orange decision or the substitution or replacement of an absent regular teaching staff member for a period of 20 or more consecutive days.

ORDER

Accordingly, on the basis of the findings of fact and conclusions of law set forth hereinabove, it is hereby **ORDERED** that the action by the respondent Board of Education of the Township of Neptune to deny payment of the minimum salary under N.J.S.A. 18A:29-5 to its permanent per diem substitute teachers for the 1985-86 and 1986-87 school years is hereby **AFFIRMED** and the herein Petition of Appeal **DISMISSED.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

27 May 1988
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

5/27/88
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JUN 2 1988
DATE

OFFICE OF ADMINISTRATIVE LAW

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NEPTUNE TOWNSHIP EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were timely filed by the parties in accordance with N.J.A.C. 1:1-18.4.

Petitioner reiterates its arguments presented during the hearing of this matter and in its post-hearing brief that the permanent substitutes in the Neptune Township School District satisfy all the criteria of N.J.S.A. 18A:29-5 and are therefore entitled to the benefits of the Teacher Quality Employment Act (TQEA). (N.J.S.A. 18A:29-5.1) It urges that the State Board's decision in Rumson-Fair Haven, supra, that permanent substitutes are not "teaching staff members," is inconsistent with prior agency interpretations of that term and that both the State Board and the ALJ in the instant matter erred in basing their decisions in part on the duties of the permanent substitutes. Moreover, petitioner avers that the ALJ erred in concluding that petitioner failed to affirmatively establish that several permanent substitute teachers were assigned to a particular classroom for 20 consecutive days or more.

Upon review of the record of this matter, the Commissioner is in full agreement with the ALJ that the State Board decision in Rumson-Fair Haven, supra, is controlling in this matter. Any argument by petitioner to the contrary is meritless. Further, although the ALJ did not see a need to address petitioner's arguments regarding Williams, supra, the Commissioner will in order to put to rest the incorrect interpretation petitioner has advanced regarding that particular decision.

Petitioner argues that:

> In the Williams decision, the Commissioner of Education distinguished the aforementioned Rumson-Fair Haven State Board of Education decision by concluding, in part, that the Rumson-Fair Haven analysis with regard to the designation of an individual as a permanent

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> substitute was inapplicable in situations where the facts revealed that a particular individual occupying that position was employed for a period in excess of twenty consecutive days in the same position. The Williams decision clearly established that each case raising the applicability of the [TQEA] to permanent substitutes must be decided on a case-by-case basis with substantial deference being accorded to a local Board of Education's actual utilization of the permanent substitute or substitutes involved. (emphasis supplied)
>
> (Initial Decision, ante)

First, the Commissioner emphasizes that the Williams matter did not deal in any part with the TQEA. It dealt exclusively with the issue of tenure acquisition and whether Williams' service in the Orange School District from April 13 to June 30, 1983 was that of a substitute or that of a teaching staff member whereby time toward tenure acquisition accrued. The board argued, inter alia, that time toward tenure acquisition could not accrue for that period because in January 1983 Williams was hired as a permanent substitute; he knew he was to be a substitute; he did not teach solely for one teacher during that time; and the only certificate relied upon was a county substitute certificate as per N.J.A.C. 6:11-4.4. The ALJ accepted the board's argument and dismissed the petition.

In its rebuttal to petitioner's exceptions objecting to the ALJ's recommended order of dismissal in Williams, the board buttressed its position by citing the decision of the State Board in Rumson-Fair Haven, which had just been issued, which stated that permanent substitutes in short-term assignments need only county substitute certificates and are not teaching staff members as defined by N.J.S.A. 18A:1-1.

Upon review of the record in Williams, the Commissioner reversed the ALJ for several reasons. First, it was determined that Rumson-Fair Haven was not applicable given that the controverted period of service, April 13 - June 30, 1983 required a standard or provisional instructional certificate. Thus, the first two criteria of Spiewak, supra, had been met for tenure acquisition, namely (1) an appropriate instructional certificate was required for the position and (2) Williams possessed such certificate. The remainder of the decision dealt with the third criteria, namely, was the controverted period of service as a substitute or a teaching staff member. Such service was deemed to be that of a teaching staff member rather than that of a substitute, not because the period exceeded 20 days but because Williams was filling a vacant position for a substantial balance of the school year. Sayreville Education Association v. Board of Education of Sayreville 1982 S.L.D. 631, aff'd State Board 1983 S.L.D. 1632, rev'd/rem'd 193 N.J. Super. 424 (App. Div. 1984); Weigand v. Board of Education of the Township of Marlboro, decided by the Commissioner April 9, 1984, aff'd State Board September 5, 1984, aff'd N.J. Superior Court, Appellate Division, November 19, 1985

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Thus, any intimation that the Williams decision means that an individual serving more than 20 consecutive days in a teaching position is not a permanent substitute but a teaching staff member eligible for compensation pursuant to the TQEA is patently erroneous.

Subsequent to the issuance of the initial decision in this matter, the N.J. Superior Court, Appellate Division decision in Rumson-Fair Haven was rendered on June 24, 1988 (A-291-87T8).

While affirming the State Board's determination that permanent substitutes fulfilling short-term assignments are not teaching staff members, the Court does determine that substitutes performing long-term teaching assignments do benefit from the TQEA. In reaching this determination, it contrasted the short-term teaching assignments in Rumson-Fair Haven to the facts in Driscoll v. Clifton Bd. of Ed., 165 N.J. Super. (App. Div. 1977), aff'd 79 N.J. 126 (1979) wherein an individual was substituting for a full year and performed all the duties of a regular classroom teacher. The Court quoted Justice Pashman's concern in Driscoll that "[t]he facts of this case should vividly demonstrate to [local boards of education and the State Legislature] the compelling need to differentiate, at least as to compensation, between short-term and long-term substitutes who perform duties commensurate with those of a full-time teacher." 79 N.J. at 127

A review of the record and petitioner's exceptions does not demonstrate that any of the substitutes in this matter filled a position comparable to that addressed in Driscoll, supra. Even granting arguendo that several substitutes at one point filled in for an absent teacher for four to six weeks, such a period falls far short of the long-term type of teaching assignment which would qualify one to the benefits bestowed by the Legislature when enacting the TQEA.

Accordingly, the ALJ's recommended decision to dismiss the Petition of Appeal is adopted as the final decision in this matter for the reasons expressed in the initial decision and expanded upon herein.

COMMISSIONER OF EDUCATION

July 11, 1988

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1086-86
AGENCY DKT. NO. 426-12/85

BOARD OF EDUCATION OF THE BOROUGH OF ENGLEWOOD CLIFFS, BERGEN COUNTY,
Petitioner/Cross-Respondent,

v.

BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,
Respondent/Cross-Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF TENAFLY, BERGEN COUNTY,
Cross-Respondent.

John J. Degnan, Esq. & **Stephanie C. Rosen**, Esq.
(Shanley & Fisher, attorneys)
for petitioner/cross-respondent

Arnold K. Mytelka, Esq. & **Agnes I. Rymer**, Esq.
(Clapp & Eisenberg, attorneys)
and **Paul L. Tractenberg**, Esq.
co-counsel for respondent/cross-petitioner

James S. Rothschild Jr., Esq. & **Glenn D. Curving**, Esq.
(Riker, Danzig, Scherer, Hyland & Perretti, attorneys)
for cross-respondent

Record Closed: December 31, 1987 Decided: April 18, 1988

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

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I. Statement of the Case

This case started as an application by a public school district for authorization from the Commissioner of Education ("Commissioner") to terminate its existing sending-receiving relationship with the high school of one neighboring district and enter into a new relationship with a rival third district willing to accept its students. Enrollments of the sending district's students at the receiving school have declined steadily over the last decade or so. Basically, the sending district alleges that deficiencies in the quality of education offered at the receiving school constitute good cause for the proposed change. Opposed to this application, the receiving district denies the charge of inadequate educational quality. Instead, the receiving district contends that the real motive behind the application is racial prejudice, characterized by reluctance on the part of parents in a largely white and upper income community to send their children to a predominantly black and Hispanic high school.

Apart from the sending district's actual intent, the receiving district complains that the foreseeable impact of terminating the existing relationship would be a substantial worsening of the racial imbalance already present at its high school. Central to the dispute is differing expert opinion about the occurrence of any "secondary" loss of the receiving district's resident students if the relationship is terminated. Although the receiving district anticipates that a large proportion of its own white, Asian and middle class black and Hispanic families would also abandon the local high school if the sending district left, the sending district challenges such projections as speculative and unfounded.

In addition to its defense, the receiving district has filed a cross-petition seeking injunctive relief to prevent the rival district from accepting the sending district's students on a tuition-paying basis, claiming that the practice deprives it of much-needed revenue and undermines racial integration in the public system. It decries what it calls the use of private school admission procedures by one public school entity to the detriment of another. Further, the receiving district

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predicts a sizeable "rebound"of sending district students to its high school if the rival option were to become unavailable. On the other hand, the sending district contends that its students would go elsewhere rather than return to the receiving school. For its part, the rival district maintains it is merely pursuing a creative solution to its own problems of declining enrollment, and that competition for excellence among public districts promotes greater choice for parents and students.

Alternatively, the receiving district asks the Commissioner to cure whatever educational deficiencies or racial imbalance may exist in each individual district by forming a new regional high school district comprised of all three. In its view, offsetting strengths and weaknesses in the constituent districts could yield improved programming, ethnic diversity and greater educational opportunity for all. Moreover, the receiving district claims that the rival district has taken the first step toward consolidation by attracting large numbers of tuition-paying students who would otherwise attend the receiving school. Both the sending and rival districts resist this suggestion. They argue that the only historical precedent for a forced merger imposed by the Commissioner involved separate districts sharing a "single community," which circumstance is said to be distinguishable from this case.

At least four major issues are raised by this complex litigation: first, determination of whether the case is governed by the new or old version of *N.J.S.A.* 18A:38-13, the statute requiring the Commissioner's approval before an existing sending-receiving relationship may be terminated[1]; second, application of the appropriate legal standard for termination of a sending-receiving relationship to the particular facts; third, the authority and grounds for issuance of any order enjoining the

[1]After filing of the petition but prior to commencement of any hearings, the Legislature amended the statutory language. *L.*1986, c. 156 (effective Nov. 24, 1986).

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rival district from accepting certain out-of-district students on a tuition-paying basis; and, fourth, the appropriateness of the exercise by the Commissioner of his acknowledged power to order involuntary regionalization to correct racial imbalance.

As the record has developed, the case implicates hard choices among important and occasionally competing state policy objectives, including social justice, academic excellence, freedom of choice and home rule. No easy answers exist which are entirely satisfactory or likely to reconcile the legitimate interests of all parties. What this initial decision sets out to accomplish is to organize the relevant facts; outline the advantages and disadvantages of various options and make specific recommendations to policymakers in the field of education. Actually, resolution of the factual dispute in this litigation is much simpler than any of the parties have portrayed it. The outcome ultimately rests on the clear illegality of the Tenafly Board's private tuition policy as a matter of law and public policy. Essentially, this decision rejects the Englewood Board's attempted quantification of "secondary" loss as purely speculative. It also rejects both sides' version of the "rebound" analysis on the ground that such issue is legally irrelevant. Finally, the crux of the case, the impropriety of the Tenafly Board's actions and the irrelevancy of any rebound analysis, will be dealt with in the section on private tuition (Section III, Part E) and in the legal conclusions (Section IV).

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II. Procedural History

On December 23, 1985, petitioner Englewood Cliffs Board of Education ("Cliffs Board") filed its petition with the Commissioner.[2] Respondent Englewood Board of Education ("Englewood Board") filed its answer on January 21, 1986, along with a cross-petition joining the Tenafly Board of Education ("Tenafly Board") as a cross-respondent. Tenafly Board filed its answer to the cross-petition on February 11, 1986. Subsequently, on February 19, 1986, the Commissioner transmitted the consolidated matter to the Office of Administrative Law ("OAL") for hearing as a contested case.

OAL conducted four prehearing conferences between April 9 and October 16, 1986. Prior to any hearings, the parties engaged in extensive discovery, including inspection of each other's high school facilities by teams of experts and depositions of expert witnesses. Thereafter, OAL held 99 days of hearings commencing on January 7, 1987 and ending on October 6, 1987. These hearings generated a massive record consisting of some 19,800 pages of transcript and 630 exhibits separately marked for identification. Judge and counsel made an unannounced site visit to the two high schools on February 27, 1987. The parties submitted their respective briefs on December 11, 1987. Upon receipt of the parties' reply briefs, the record closed on December 31, 1987. Time for preparation of the initial decision has been extended to April 18, 1988. An appendix to this decision contains a list of witnesses and exhibits.

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[2] "Cliffs" refers to the Englewood Cliffs municipality. "Cliffs Board" refers to the Englewood Cliffs Board of Education. "Cliffs district" refers to the public school district of Englewood Cliffs. "Cliffs students" refer to students residing in Englewood Cliffs. Corresponding designations are used for Englewood ("Englewood") and Tenafly ("Tenafly").

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III. Findings of Fact

A. Background Characteristics of the Three Communities

Geographically, Englewood, Cliffs and Tenafly are located adjacent to each other on the eastern edge of Bergen County, within easy commuting distance from New York City. Englewood is the largest in physical size, roughly five square miles, followed by Tenafly, nearly four and a half square miles, and Cliffs, just under two square miles. In terms of population, Englewood is also the biggest, with a count of 23,701 in the 1980 Census, almost twice as large as Tenafly, with 13,552, and four times as large as Cliffs, with 5,698. Cliffs and Tenafly are suburban communities, while Englewood may best be described as urban.

All three are affluent communities, relative to others in the same county and state. Illustratively, the Planner's Data Book for Bergen County shows average gross income per homeowner reported on 1984 state tax returns as $82, 436 for Englewood, $94,992 for Cliffs and $103,833 for Tenafly, compared to $53,912 for Bergen County and $43,346 for all of New Jersey. Relative to each other, however, the households of Cliffs and Tenafly have much higher income levels than those of Englewood. Median per capita household income in 1979 reflects this relationship, with Englewood at $21,052, Cliffs at $37, 269 and Tenafly at $33,774, putting all but Englewood in excess of the county total of $24,056. A study prepared by the planning firm of Candeub, Fleissig & Associates for the Tenafly Board indicates that in 1980 Englewood had "substantially more households earning less than $10,000" than did Cliffs or Tenafly. At the other end of the scale, Cliffs and Tenafly had "twice the percentage of households with incomes of $35,000 or more." By other indicia of wealth or social status, Cliffs and Tenafly also come out ahead of Englewood, although all three considerably surpass most communities. More Cliffs and Tenafly than Englewood residents have completed high school, and more are employed in professional, technical or managerial occupations.

In terms of racial composition, Cliffs and Tenafly are much less diverse than Englewood. Latest census data reveal that, in round

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numbers, the white school-aged population (ages 5 to 17) of Cliffs is 84% and of Tenafly is 88%, as opposed to a white school-aged population in Englewood of 37%. Corresponding figures for the black population are substantially less than 1% each for Cliffs and Tenafly, in comparison to 48% for Englewood. Hispanics constitute almost 4% of the Cliffs and Tenafly school-aged populations, compared to 11% for Englewood. Both Cliffs and Tenafly have sizeable and growing Asian populations, constituting nearly 12% of the Cliffs and 7% of the Tenafly school-aged population. Over the decade ending in 1980, the Asian population in the Tenafly community at large increased more than sevenfold. Economically, the Asian minority as a whole is nearly as prosperous as the white majority and, in some areas, such as value of housing, even better off. Thus, the Asian component, while clearly different ethnically and culturally from the white majority, is not disadvantaged in any financial sense.

The Cliffs district seeks to dissolve its existing sending-receiving relationship with the Englewood district and to substitute a new relationship to be formed with the Tenafly district. Governed by an elected school board, the Cliffs K-to-8 district is too small to support its own local high school. It operates two elementary schools, one for kindergarten through grade three and another for grades four through eight. Graduates must go outside the district for high school, either to the designated receiving school, currently Dwight Morrow High School ("DMHS") in Englewood, or to some other school at the family's own expense. As of September 30, 1987, the Cliffs district enrolled 486 students. Of that total, more than half (51%) are white and a large proportion (42%) are Asian. Combined black and Hispanic enrollment amounts to only 7%.

The Englewood district, which has an appointed school board, operates two elementary schools, one middle school, and the previously

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mentioned high school, DMHS, for grades nine through twelve.[3] Total district enrollment on September 30, 1987 was 2,411, including 799 students attending DMHS. At DMHS, the vast majority of students are black (66%) or Hispanic (18%), together comprising roughly 84% of the student body. Whites are underrepresented. Present white enrollment at DMHS (12%) is disproportionately low compared to the number of school-aged whites (37%) living in Englewood at the time of the census, suggesting that DMHS is experiencing difficulty drawing white students from within the Englewood community itself.[4] Asians, on the other hand, represent a slightly higher proportion (4%) of the DMHS student body than their incidence in the school-aged population (3%) in the census.

Like the Cliffs district, the Tenafly district serves a predominantly white and Asian population. It too has an elected school board, which oversees a system consisting of four elementary schools, a middle school and a four-year high school. Under a long-standing arrangement, Tenafly High School ("THS") is the receiving school for high school students from Alpine, a wealthy community bordering on Tenafly's northeast corner. Additionally, the Tenafly district attracts large numbers of out-of-district students who pay tuition in order to attend. Inclusive of nonresident students, the entire Tenafly district enrolled 2,325 students on September 30, 1987. There were 891 students at THS

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[3]Starting next year (1988-89), the Englewood Board plans to house its resident eighth grade students in a portion of the facilities, now occupied exclusively by DMHS. One result of this relocation will be a restructuring of students at the high school level into an eighth and ninth grade group and a tenth and eleventh grade group. Despite the presence of the eighth graders at the high school, Englewood school officials envision that the high school program will remain "based on a 9 through 12 arrangement with the same curriculum."

[4] Plausible explanations exist for this phenomenon, including the presence of a considerable Orthodox Jewish population who prefer parochial education and a large number of well-to-do households with a family tradition of private schooling. Whatever the reason, the fact remains that DMHS would be much better integrated if more whites from within the district chose to attend the public school system.

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alone, composed mainly of whites (80%) and Asians (18%), with a smattering of blacks (1%) and Hispanics (1%). In contrast to the disparity found at DMHS, the breakdown at THS more closely mirrors the racial distribution in the host community.

B. Historical Overview

The instant litigation is the culmination of an unfortunate deterioration in cordial relations between the Cliffs and Englewood districts which occurred gradually over many years. More than 22 years ago, on October 4, 1965, the two districts voluntarily entered into a contractual agreement, whereby the parties undertook to share expanded high school facilities in Englewood for a minimum of ten years, subject to existing law which, then as now, required approval of the Commissioner before a sending-receiving relationship could be terminated. In the beginning, both participants must have considered the arrangement mutually advantageous, since the Englewood Board promised to "construct additional high school facilities and expend monies for this purpose," while the Cliffs Board obligated itself to send a certain percentage of its freshmen class every year through 1976.

During the intervening years, at least since 1977, attendance of Cliffs students at DMHS has dropped dramatically, at a much faster rate than the general decline in school-aged population. Throughout most of the 1970s, the number of Cliffs ninth graders entering DMHS hovered in the vicinity of 60% of the graduating eighth grade class. Thereafter, this number fell markedly from a high of 69% in the 1980-81 school year to a low of 4.4% in the current 1987-88 year. Today, the actual number of Cliffs students enrolled at DMHS has dwindled to 21, equal to 2.6% of total DMHS enrollment of 799 students.

Attempts by the Cliffs Board to reverse this trend have not met with notable success. Conscious efforts by board members to say positive things about DMHS, publication of favorable items in a monthly newsletter, and sponsorship of "cottage parties" to sell Cliffs residents on the value of DMHS have had little or no effect. The Englewood Board criticizes the Cliffs school administration for not doing enough to

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encourage attendance at DMHS and for undermining its status by providing instructions to parents on how to apply for admission to THS.

Concern about the enrollment situation dates back to 1978, when the Cliffs Board commissioned a study of community attitudes by a team of researchers under the leadership of Professor Francis Ianni of Columbia Teachers College. In a report issued in early 1979, the authors of the Ianni study concluded that dissatisfaction in the lower grades centered on class size and atmosphere, shifted in the middle grades to academic preparation and, at the high school level, focused on "social characteristics, primarily 'racial balance' and 'discipline.'" However, the researchers also found educational standards at the high school to be "an important issue," particularly for parents who, for economic reasons, are "unable to send their children to non-public schools." Prophetically, the 1979 Ianni study predicted that nonuse of the public school system by Cliffs residents "seems destined to increase rather than decrease" and that this inclination was likely to worsen "with grade level."

Ample opportunity exists for many Cliffs students to go elsewhere because of their parents' ability to afford tuition payments and the availability of numerous private and parochial alternatives in the immediate metropolitan area (a chart in evidence depicts more than 20 nearby nonpublic secondary schools). Dr. Harold France former school superintendent of the Cliffs district, recalled that the student drain began as early as sixth or seventh grade because of parents anxious to reserve a future place for their child in selective private high schools.

In the late 1970s, a series of articles appeared in newspapers circulating in Bergen County which emphasized negative aspects of DMHS and tended to put that school in an unfavorable light. Adverse publicity generated by such newspaper accounts contributed to the growing public perception that DMHS had serious problems which, in turn, aggravated the declining enrollment of Cliffs students at DMHS. Meanwhile, deep-seated discontent with DMHS found expression in the political debate for local elective office in the Cliffs community. It is true that the topic never became a partisan issue, since all candidates

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were in favor of terminating the existing relationship. Campaign literature for recent borough council and school board elections indicates, however, that various factions vied against each other in proclaiming opposition to ties with DMHS. Ultimately, the slate most strongly committed to severance, headed by current Cliffs Board president Carin Geiger, won control of the school board and voted, on September 23, 1985, to institute this litigation.[5]

Cliffs Board made initial overtures in October 1985 about the possibility of establishing a new sending-receiving relationship with the Tenafly district. For reasons of its own, the Tenafly Board was receptive to the idea. Faced with declining enrollment, the Tenafly Board saw affiliation with Cliffs as a way to avoid cutbacks in teaching staff, to stabilize class size so as to make scheduling easier and to provide additional revenues to the district. Within a few days of each other in November 1985, the Cliffs and Tenafly Boards adopted complementary resolutions authorizing entry into the new relationship, conditioned on receipt of the necessary approval of the Commissioner.

Each side attributes the sharp drop in Cliffs enrollment at DMHS to different underlying causes.[6] Interestingly, both share the common assumption that, in the Englewood Board's words, "parents want the best education for their children," or, as the Cliffs Board expresses the same idea,"parental perceptions of [educational] quality drive their

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[5]This is not the first time that the Cliffs Board has attempted to withdraw from its sending-receiving relationship with DMHS. Previously, in March 1977, the Cliffs Board filed a petition with the Commissioner, which, as amended in January 1978, alleged that the ten-year contract between the districts had expired and also that it should be free to choose a new receiving district to assure a "thorough and efficient education" for its students. The Commissioner never had occasion to make any final determination of these contentions. Instead, the petition was eventually dismissed for lack of prosecution, and the Commissioner subsequently denied Cliffs Board's request for reinstatement of the suit. *In re Application of Englewood Cliffs Bd. of Educ.*, No.91-80 (Comm'r Nov. 13, 1980). Since no disposition was reached on the merits, Cliffs Board is not precluded from litigating identical or similar issues in the present cause of action.

[6]Although the Cliffs and Tenafly Boards do not have identical interests, their positions coincide on this as well as on most other important points.

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decisions on where they will send their children." From the Englewood Board's viewpoint, the root cause of the decline is fear and racial bigotry, fueled by false rumors, misconceptions about actual conditions at DMHS, and passions aroused by this very litigation. In support of this thesis, the Englewood Board offered the compelling testimony of a highly articulate recent DMHS graduate who vividly told of her Cliffs classmates' widespread use of derogatory racial terms and gave anecdotal instances of stereotypical images which colored some of her classmates' thinking (for example, the irrational and totally unjustified fear that a female student might be "attacked, raped, mugged or who knows what" if she went to DMHS).

From the Cliffs Board's perspective, the exodus of Cliffs students is triggered by the belief held by many parents that the quality of education at DMHS has been deteriorating. Typical of this outlook were the feelings voiced by Wolfgang Reich, prior Cliffs board member and father of four, who poignantly described the dilemma between his personal commitment to the concept of public education and his unhappiness with current conditions at DMHS. Reich, whose family had moved into the Cliffs community because of the fine reputation of its school system, had been pleased with the education received by his oldest daughter, had some reservations about the experience of his second daughter and was dissatisfied with the experience of his third daughter, then a senior at DMHS. Specifically, Reich felt that his third daughter had been exposed to "ostracism" and "polarization" along racial lines, which had the temporary effect of causing her to hate going to school. Reluctantly, he has decided that, unless conditions at DMHS change for the better, he will not put his youngest daughter through the same "heart-wrenching experience."

Undoubtedly, the truth lies somewhere between these extremes. Some individuals in the Cliffs community may well be motivated entirely by baser instincts and dislike of people different from themselves. Others may be motivated solely by a desire to do what is best for their children. Fortunately, the applicable legal standard does not depend on probing the human heart to ascertain the subjective

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intent of individuals. Consequently, our attention must turn to the proofs on the quality of education.

C. **Educational Reasons for Termination of the Existing Relationship**

Much of the exhaustive record is devoted to expert proofs about the quality of education at DMHS and THS. As counsel for the Englewood Board has observed, DMHS and, to a lesser degree, THS were put through a "microscopic" examination which few, if any, other schools in this state have ever endured. Inevitably, the comparison degenerated, at times, to an overly simplistic argument over which school is "better" than the other. At the outset, it should be clearly stated that both DMHS and THS are good at what they do, although each concentrates on a different type of student and follows its own distinctive educational approach. Englewood district has passed Level I monitoring by state officials, the highest stage, and hence is fully certified as satisfying state standards for a thorough and efficient education.

Research by Weber, Brookover, Corcoran and others suggest that powerful outside influences on academic performance, such as socioeconomic status and parental involvement, can be partially counteracted by characteristics identified as common to effective schools. These characteristics include strong administrative leadership, especially at the building principal level; high expectations for academic achievement; a safe and orderly school environment; commonly held goals and beliefs; frequent assessment of student progress; emphasis on basic skill acquisition; and high rates of time-on-task activities by teachers and students. With varying success, both Englewood and Tenafly districts attempt to incorporate the lessons learned from effective schools research into their educational programs. Experts produced by both sides used the criteria derived from effective schools research as one way of determining educational excellence. Several of the experts also followed the general model of looking at "inputs or resources" allocated to the educational system and at "output measures" for ascertaining accomplishments, although,

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of course, they expressed contrary opinions on the merits of the dispute.

Perhaps the most striking difference between the two districts is in school climate and culture. While both offer well-rounded college preparatory programs, DMHS has a much greater emphasis on improving basic skills, maintaining discipline and increasing attendance, areas taken more for granted at THS. Illustratively, Dr. Smoley, the Tenafly Board's educational consultant, commented that the 1985-86 goals and objectives for the Englewood district focus on improving scores for secondary students in the bottom quartile on standardized reading and mathematics tests, whereas corresponding goals and objectives for the Tenafly district relate to higher achievement in advanced placement chemistry. Summarizing the main distinction, Dr. Smoley indicated that DMHS directs more attention to special and vocational education than does THS, which concentrates more on accelerated or enriched courses. In Smoley's view, these differing goals and objectives represent appropriate responses to differing needs in the two districts. Along similar lines, Englewood Board's curriculum expert, Dr. Alma Evans, testified that both schools cater to the needs of college-bound students, but that THS, unlike DMHS, has those needs as its primary purpose. In other words, DMHS has a broader and more comprehensive program and THS a narrower and more specialized one.

Another major difference in atmosphere between the two schools is the importance attached to strict enforcement of proper student behavior. When Richard Segall, a respected and dynamic educator, assumed the duties of principal of DMHS in September 1986, he took immediate steps to make it more difficult for students to cut classes, to put students in required study halls and to restrict access to portions of the campus during the school day. In contrast, THS has an innovative policy, known as "individual decision time," which gives qualified students considerable freedom to travel about the school building during unscheduled periods and manage the use of their own free time. Dr. Daniel Knueppel, the highly capable assistant superintendent of the Tenafly district who originated the concept, reported that returning

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graduates have praised the learning experience as helping to instill a sense of personal responsibility and the self-discipline expected of students in college. The point here is not that more or less control over student conduct is necessarily the correct pedological technique, but rather that two school administrations have embarked on separate courses of action to meet what each regards as the unique needs of its own student body.

Considerable controversy surrounds the accuracy of certain statistics collected by the Englewood district and the validity of comparisons to similar statistics for other districts. To substantiate its contention that DMHS suffers from serious discipline problems, the Cliffs Board introduced an analysis of attendance figures, dropout rates, suspension and expulsion rates, and reports of visits to the school by police or fire departments. A study prepared by Educational Administration Associates ("EAA"), a group of educational consultants retained by the Cliffs Board, noted that in 1985-86 the DMHS average daily attendance rate was 88.57%, far short of its own goal of 95% and placing it at the very bottom of the rankings of 45 Bergen County high schools. Attendance at DMHS improved to 90.8% by 1986-87, but even that is five percentage points below the 95.9% figure for THS. Meaningful comparison of dropout rates is difficult, due to deficiencies in record-keeping by DMHS staff and changes in reporting requirements. Such data as are available suggest that the dropout rate at DMHS went as high as 20% in 1985-86, a figure the Englewood Board insists is inflated. Given the benefit of the doubt, DMHS's dropout rate of 7.78% in 1986-87 (69 students out of a total enrollment of 887) is still disturbingly high, contrasted to the county dropout rate for grades 9 to 12, which in recent years has ranged between 2 and 3%. Analysis of suspension rates is complicated by the fact that local districts have different policies about what offenses deserve suspension and whether in-school or out-of-school suspension should be imposed. Nonetheless, the number of out-of-school suspensions at DMHS reached a maximum of 272 in 1981-82 and remained as high as 243 in 1985-86. Out-of-school suspensions decreased to a more acceptable 158 in 1986-87, when principal Segall adopted a sensible policy of supervised detention so disruptive students

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could continue to receive some benefits of education. Regardless of the exact magnitude of the discipline problem, the Englewood Board clearly recognizes its past deficiencies in this area and is seeking to correct them. DMHS had five disciplinarians on its staff in 1986-87, one for every 117 students.

The record fails to provide support for what some Cliffs parents apparently fear most, that their children will be in risk of physical harm if they attend DMHS. Of course, there was reference to the normal juvenile incidents of name-calling, shoving and pushing on stairways or in corridors, and what might be called hazing of underclassmen by seniors. But even these events were described through hearsay evidence rather than direct testimony of the alleged victims. Compared to other schools, DMHS does indeed have a history of an unusually large number of police and fire department involvements. Police made 32 visits to DMHS in 1984 alone, mostly for trespassing or disorderly conduct complaints but also for assault, drug or weapons investigations. By 1986 the number of police visits had declined to 14, presumably in part because of Segall's new policy of handling trespassing incidents internally without notifying the police. Fire department responses to DMHS totalled 24 in 1985, 17 in 1986 and similarly high numbers in earlier years. Nearly all involved false or malfunctioning alarms, fires outside the buildings or incidents occurring after regular school hours, so there was little actual exposure of students to injury.

One piece of testimony hard to accept at face value is Mr. Segall's assertion that he was unaware of any significant drug use by students on the DMHS campus; but the record is devoid of contrary evidence to prove him wrong. No substance abuse incidents at DMHS were reported in 1985 or 1986. Between September 1986 and early May 1987, DMHS took no disciplinary action against any student for drug use or distribution. THS, by comparison, reported three incidents of marijuana or cocaine use in 1985-86 and admitted concealing the true extent of drug abuse incidents in 1984-85 (the actual number of

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incidents that year was 18). This could mean either a more serious drug problem at THS, or simply greater vigilance by Tenafly school officials.

In view of the importance of strong leadership to successful operation of an effective school, the EAA study was extremely critical of the high rate of administrative turnover experienced in the Englewood school system in general and at DMHS in particular. Over the last eighteen years, the Englewood district has had eight permanent or acting superintendents and six different high school principals. Of greatest concern has been administrative instability at DMHS, where three individuals have held the position of principal since 1980. Segments of the Englewood community, including Barbara Marson, former school board president, accused Segall's immediate predecessor of having "lost control of the school." When this past principal came under consideration for tenure in April 1986, Englewood Board failed to renew her contract. Tenafly district too has experienced administrative turnover problems, not the least of which was the abrupt departure of Mr. Wilson, THS's principal, prior to completion of the 1986-87 school year. Both districts also have relatively new superintendents, Larry Leverett having come to the Englewood district in March 1986 and Dr. Gerald DeGrow having joined the Tenafly district in August of the same year. None of the witnesses challenged the impressive qualifications or obvious competence of Richard Segall, DMHS's incumbent principal. Lack of administrative stability at DMHS continues, however, as demonstrated by the fact that one of two assistant principals just left for another district and the other was recently denied tenure.

Professor Edward White, the school management expert responsible for coordinating the work of the EAA team, acknowledged that the DMHS teaching staff possesses appropriate certification and has adequate training and experience. On the basis of only limited observations, EAA did not attempt to evaluate classroom performance of individual teachers. Broadly speaking, it can be said that THS teachers have a slight edge over their DMHS counterparts both in years of experience and in attainment of a master's degree or above. (See the

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report prepared by the consulting firm of Cresap, McCormick & Paget for the Tenafly Board.) Longevity of teaching staff is not an unqualified blessing, since new blood is also healthy for a school district. But the most salient difference between the two staffs is racial composition, an item which can be influential in developing positive role models for black and white children alike. In this area, THS is sorely deficient. Except for one Hispanic and one Asian teacher, THS's teaching staff of 87 was virtually all white in 1986-87. That same year, DMHS's teaching staff of 94 was 61% white, 32% black and 6% Hispanic or Asian.

Staff development at DMHS has been criticized by EAA and internally by Englewood school employees for inadequate consultation with teachers in the planning of programs, insufficient funding and lack of consistency. In May 1984, a curriculum director for the Englewood system expressed his reservation that one promising training program should not be allowed to become just another "soon to be forgotten ... gimmick." A recent survey (the Kettering School Climate Profile), undertaken by Mr. Segall to learn the attitudes of his teachers, discloses widespread unhappiness with the current in-service training programs available at DMHS. This same survey shows that teacher morale at DMHS is low in some areas, such as involvement in the decision-making process and satisfaction with the physical working environment. Superintendent Leverett has made staff development a high priority, and there are some aspects of the DMHS program which THS cannot match, such as participation in the state-sponsored Academy for Teaching and Management and a contractual provision for reimbursement of graduate course tuition. Morale at THS also appears to be suffering, as noted in a grant application which describes teachers as feeling that they lack input on decisions affecting them and do not receive recognition for their efforts.

Insofar as curriculum is concerned, DMHS and THS offer a common core of similar academic subjects, at least as set forth on paper in their respective curriculum guides and course descriptions. Both provide a wide range of courses for students of different ability levels and interests, including advanced placement, honors and enriched courses.

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Class size tends to be lower at DMHS, less than 20 students per class, while THS often has more than 20 in a class. Graduation requirements are practically identical, except that DMHS requires 110 credits and THS 115 credits. Also, DMHS requires one more year of mathematics in order to graduate than the state minimum.[7]

EAA witnesses detailed numerous shortcomings in the DMHS curricula and instructional program, including the Englewood Board's unwillingness to appropriate money requested by Mr. Segall for acquisition of needed computer equipment; failure to incorporate existing computer capacity into a "traditional" and "broad range[d]" mathematics and science program; deficiencies in the variety and challenge of the social studies curriculum content; an industrial arts program which insufficiently addresses the expanded role of technology; and a music program unable to induce a sufficiently high level of student participation. Principal Segall, Dr. Evans and others pointed out many good things about the DMHS curricula, among which are a strong English department of exceptional scope and depth, a cable television station operating on the school premises, greater opportunity for exchange of different outlooks because of the racial and economic diversity of the students, and an extensive career education program with a work experience component. [8]

Important differences in emphasis between the two districts are equally evident in other aspects of the total educational program. For

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[7]For 1987 graduates, DMHS required three years of mathematics, while the state minimum was only two years. Beginning with 1988 graduates, DMHS will require four years of mathematics. Regulations raising the state minimum to three years of mathematics do not take effect until the ninth grade class of September 1990. *N.J.A.C.* 6:8-7.1(c)1i(2).

[8]Dr. Smoley conceded that the industrial arts program at DMHS was more "substantial" than that offered by THS. Although THS's industrial offerings are limited, the district does make arrangements to send students with specific vocational plans to the Bergen County Technical Education Center for half a day in addition to their academic program in Tenafly.

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example, Dr. Shirley Cohen, a recognized expert in the field of special education, praised DMHS for offering a broad "continuum" of special education services extending from "remedial and preventive programs" to separate "self-contained classes" designed expressly for students with specific types of handicapping conditions. THS makes an effort "to serve students with special needs without classifying them," an approach disparaged by Dr. Cohen but nonetheless consistent with recent proposals in New Jersey to avoid unnecessary labeling and focus instead on instructional needs.[9] Children with learning difficulties are tutored in a resource room setting by a certified teacher of the handicapped or receive remedial instruction in so-called "essentials" courses. Since THS lacks a full-spectrum special education program of its own, students in need of more intensive services must be sent outside the district to regional consortiums, other public schools, or private placements.

Similarly, the two schools follow different philosophies regarding delivery of guidance services. DMHS offers a wider range of services to its students beyond the usual orientation and college or career counseling, including such other services as crisis intervention, group counseling and peer tutoring. Although THS has a more conventional guidance program emphasizing college admissions, Dr. Smoley commented that Tenafly guidance counselors are more "proactive," reaching out to provide assistance rather than waiting for students to come for help. Whether one or the other school has a higher student-counselor ratio depends on how the counseling function is defined. DMHS has a greater number of full-time equivalents on staff. But because DMHS counselors divide their time among varied duties, THS has a smaller caseload per counselor.

Library facilities are an item to which the Tenafly district clearly assigns a much higher priority than the Englewood district. THS houses

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[9]See the pilot project known as *The Plan To Revise Special Education in New Jersey* (Jan. 1986).

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an attractive, brightly lit "media center," well-stocked with an up-to-date collection of 28,000 books, audiovisual equipment and language lab. On a visit while school was in session, Dr. Thomas Gallia, an EAA associate, observed the center in use by "numerous" students. By comparison, the "clean and organized" library facilities at DMHS, located in separate buildings, contain a smaller collection totaling about 16,000 volumes. In a random review of the science literature, Dr. Gallia discovered that much of the material was outdated or obsolete. Only a handful of students used the library at one time, numbering no more than 33 in one six-hour day as recorded on sign-in sheets. Acknowledging that the DMHS libraries had been underfunded and underutilized, Segall testified about steps taken to improve the situation, including longer library hours and a 300% increase in the amount budgeted for printed materials.

Both DMHS and THS offer a wide array of co-curricular activities, including athletic teams, honor societies, debating and public affairs clubs, dramatic and musical productions, and school publications. Cliffs students attending DMHS actively participate in these activities, and a fair number presently hold leadership positions, such as captains of the girls' tennis and basketball teams. In fact, the degree of participation by Cliffs students in co-curricular activities at DMHS exceeds that of their Cliffs peers at THS. In 1986 a white student from Cliffs was selected prom queen at DMHS. In 1985-86, another white Cliffs student was captain of the otherwise all-black varsity wrestling team, whose members were chosen on the basis of ability. Despite allegations that white students at DMHS are made to feel "unwelcome" in afterschool activities, two recent Cliffs graduates testified that they never encountered any difficulties in being accepted and never were excluded from social activities. One jarring exception, especially for a public high school dedicated to improved understanding between races, is the existence of an officially-sanctioned activity known as "Inner Pride," which had never admitted a white member until this litigation began. Described as an exclusively male "fraternity-like organization," Inner Pride was founded years ago "to foster character, academic achievement and service to the school." Although its written charter

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does not expressly restrict membership to persons of any one race, the first and only white member was admitted early last year. A newer and less established DMHS organization for female students, known as "Positive Image," does not have any white members at all.

Appearance and condition of the physical facilities occupied by the two schools are distinctly different. Older and more in need of repairs, DMHS consists of two structures, the North Building built in 1931 and a detached extension, Martin Luther King Hall, added in 1967. These two buildings sit majestically on a beautifully landscaped and wooded 34-acre campus, also shared by the Englewood Middle School. On the exterior, the North Building has an exceptionally attractive Gothic facade reminiscent of the architecture of Princeton University. Inside, however, the antiquated North Building leaves an impression which George Johns, an architect specializing in school facilities, described as a "drab" environment. Newer and more contemporary in design, King Hall appears "colder and sterile" and has in the past been the object of "more vandalism and graffiti." At one point, the North Building was in such state of disrepair that the authors of the district's 1979 Master Plan for Educational Facilities recommended consideration of abandoning the building altogether. However, in 1981 the Englewood Board embarked on an ambitious renovation project, which has cost 1.45 million dollars and entailed installation of a new central heating system, replacement or repair of windows and roofs, rehabilitation of locker rooms, and improvements to the King Hall auditorium. Moreover, the Englewood district has approved a long-term capital plan envisioning further expenditures of 2.08 million dollars at the high school over the five-year period 1987 through 1991.

Expert witnesses gave conflicting testimony about alleged safety hazards and code violations said to exist at DMHS. Back in 1985, an inspection team from the Education Department's Bureau of Facility Planning Services had visited the DMHS site and reported over twenty deficiencies of varying degrees of seriousness from "chained and locked" exit doors to "crumbly plaster" in a couple of classrooms. More recently, in September 1986, EAA's facilities expert, Dr. Mario Tomei,

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conducted a repeat inspection and saw what he claimed were innumerable continuing deficiencies from "graffiti" and "inoperable toilets" to "damaged lockers" and "chained doors." Architect Johns inspected the DMHS premises in October 1986 and he too purportedly discovered many substandard or unsafe conditions, including improper door hardware, worn stair treads, boiler plant violations and inadequate "segmenting" of the structure to contain the spread of fire. In response, Kenneth Albert, a licensed professional engineer, answered each of the charges point by point, either denying the existence of the alleged deficiency or explaining measures employed to rectify the problem. Significantly, neither local nor state officials responsible for enforcement of construction and fire safety codes have cited DMHS for any violations of law.[10] For purposes of this proceeding, therefore, DMHS must be deemed in substantial compliance with all applicable building standards.

Situated on a 28-acre tract alongside a stream, THS is a modern, well-maintained facility completed in 1972. Hallways and classrooms are colorful and pleasantly decorated. THS projects a different image from DMHS, one that is bright, cheerful, and conducive to its function as a place for learning. THS possesses many highly desirable features, including its outstanding media center, well-equipped science and computer laboratories, student-teacher conference rooms and a television studio.

As to "output measures," DMHS students, in the aggregate, score consistently lower than THS and other Bergen County high school students on standardized tests. One such test is the High School Proficiency Test (HSPT), a criterion-referenced instrument developed under the auspices of the New Jersey Department of Education as a measure of reading, mathematics and writing skills needed to function effectively in our society. In designing the test, the Department made a

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[10]The 1985 inspection by state officials from the Department of Education was performed at the request of the Englewood district and did not result in any enforcement action against DMHS.

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conscious effort to eliminate racial or cultural bias through field testing and submission of suspect items to minority review committees. Statistics gathered since the HSPT was first administered in March 1984 show that test scores of DMHS ninth graders have lagged behind scores of ninth graders in other school districts. Thus in 1985-86, the first year that passage of the HSPT became a graduation requirement for entering ninth graders, the DMHS percent passing on both the reading test (74.4) and the mathematics test (58.7) was second lowest in the county. Further, the DMHS percent passing in both subjects was lower than comparable statewide figures (82.5 in reading and 71.8 in math), and much lower than comparable THS figures (99.0 in reading and 94.1 in math). On the writing test as well, DMHS's percent passing (74.4) was lower than either statewide (76.5) or THS (96.6) percentages. Comparison of DMHS's scores to other districts in the same "district factor grouping," a category controlled for income, education level and socioeconomic status, yields similar results, with DMHS having the lowest percent passing in reading, math and writing of the 27 districts in Group F.

Last year, in 1986-87, DMHS's scores on the HSPT improved substantially. The district's endeavor to "align" its curriculum with the content of the HSPT has apparently paid off. DMHS's percent passing rose dramatically in all three areas, reading (90.6), math (81.5) and writing (88), placing the Englewood district above the statewide passing rate in math (77) and writing (85.9), but slightly below the statewide passing rate in reading (91). Nonetheless, THS did much better, scoring well above average in reading (99.5), math (95.0) and writing (97.2). Notwithstanding this limited success, DMHS still ranked third lowest of the 43 Bergen County districts in reading, fifth lowest in math and seventh lowest in writing. In comparison to other high schools in its district factor group, DMHS also did poorly, ranking second lowest in reading, ninth lowest in math and tying for fifth lowest in writing. However, if one looks at urban districts, DMHS compares favorably, ranking eleventh highest out of 56 districts in its overall passing rate.

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DMHS students' performance on the Comprehensive Test of Basic Skills (CTBS) has been below national norms. College-bound students, however, do well at DMHS. Indeed, test scores of DMHS students on the Scholastic Aptitude Test (SAT), the college entrance exam published by Educational Testing Service, are in keeping with New Jersey averages.

While the Englewood Board does not deny that DMHS students fare less well than the rest of Bergen County on standardized tests, it offers a convincing explanation for this difference. In the aggregate, the higher the socioeconomic status of students, the higher will be the standardized test results. This well-recognized relationship has been confirmed by study after study, and even the EAA experts acknowledge that it was a major impetus behind the effective schools movement. National statistics gathered recently by Educational Testing Service and reported in its 1987 *Profile of SAT and Achievement Test Takers* reaffirm the general pattern. Mean scores of college-bound seniors on the 1987 SAT correlate perfectly with family income and education levels.

Educational consultant Dr. Fleischer disputed the EAA's exaggerated assertion that an "effective school" can fully overcome the influence of socioeconomic status on test scores. Instead, Fleischer interprets effective schools research as making the more modest claim that the adverse effect of low socioeconomic status can be "reduced" but never entirely "neutralized." Students at DMHS bring with them a lower "baseline" of skills, so that lower test scores do not necessarily imply any criticism of the instructional program. As Mr. Segall verified, many students at DMHS come from lower socioeconomic backgrounds or have recently transferred from other places. Proper comparative analysis of DMHS test scores must take socioeconomic factors into account. Although the Education Department's district factor grouping attempts to control for socioeconomic status, this may be misleading when applied to the unusual circumstances of DMHS. Since so many parents in Englewood send their children to private or parochial schools, the socioeconomic status of the community at large is much higher than that of the students actually attending DMHS. Thus, the

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district factor group, based on the community as a whole, may not accurately reflect the true socioeconomic status of the students at this particular school.

College admissions are another measure of the "outcome" of a good high school. A substantial number of DMHS graduates go on to attend selective four-year colleges. Of the class of 1986, 55 DMHS graduates attended colleges rated "very competitive" or above in *Barron's Profiles of American Colleges* (1966 ed.). The following year, DMHS graduates received 71 acceptances from colleges of the same high caliber.

Moreover, DMHS students may even have a greater chance than THS students of being accepted by some top-notch colleges. Louise Burnham, assistant director of admissions for Yale University, testified that, all other factors being equal, her office would give preference to students coming from schools like DMHS, whose exposure to racial and cultural diversity makes them more interesting. Yale University puts DMHS on its "must visit" list for annual trips, while THS is slated for less frequent visits. Seven DMHS graduates were admitted to Yale in the last two years, compared to only three THS graduates. The significance of such numbers as an abstract indicator of educational excellence is blurred, however, by college minority recruitment programs designed to compensate for years of discrimination. Viewed more broadly, THS sends a greater percentage of its graduates to four-year colleges in general. In 1987, for example, roughly 83% of THS seniors entered some four-year college, as compared to only 64% of DMHS seniors. This spread of 20% or more between the college attendance rates for graduates of the respective schools has held steady for the last five years. Thus, while a DMHS graduate may have a statistical advantage in being accepted to Yale University, the THS graduate is much more likely to go to some four-year college (a finding which may reflect economic as much as educational realities). However, the ability of Cliffs students to pursue higher education does not appear to have been hampered in any way by attendance at DMHS. Of the 23 Cliffs students graduating from DMHS in 1986, a remarkably high 22 of them, nearly 96%,

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continued on to college. Testimony from DMHS students themselves indicates that those who do attend college regard themselves as well prepared and able to perform college-level work.

Quality of a school district is also related to its capacity to correct identified deficiencies and respond rapidly to constructive criticism. Many of the problems pinpointed in prior surveys and studies of DMHS sound sadly familiar, including the 1979 Pitruzello and Bishop report (loss of management credibility; faculty alienation; low scores on basic skills tests), the 1979 Gerber memo (lack of leadership; poor morale of teachers and students), and the 1979-80 needs reports by the Parent Teacher Organization (low teacher morale; need for wider use of computers; lack of science activities; inadequate library materials; below grade-level performance in English). With the arrival on the scene of principal Segall, the Englewood Board has mounted an effective campaign to deal with these and other recurring problems.

Indicative of the nature of DMHS's past problems is its delay in completing the reaccreditation process. Middle States Association of Secondary Schools and Colleges ("Middle States"), a voluntary organization engaged in setting accreditation standards for member school districts, has an elaborate procedure which includes a "self-study" by the applicant district and a three-day inspection by a Visiting Committee composed of reputable educators. DMHS is fully accredited by Middle States. Normally, a member district undergoes the accreditation process every ten years. In connection with last full evaluation completed in 1976, the 25-person Visiting Committee issued an extensive report making an unusually large number of recommendations for improvements in staffing, administration and other areas. When the deadline for reevaluation was about to expire in 1986, Middle States granted three successive requests for postponement, the last on the basis that DMHS had suffered "a long period of administrative instability." In the interim, a three-person Investigative Committee paid a brief visit to the school in November 1985 to verify that DMHS remained eligible for accreditation pending

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evaluation by the regular Visiting Committee, now scheduled to occur three years late in 1988-89.

Goodwill and cooperation are crucial to any successful sending-receiving relationship because the guest district has no direct control over the way in which the host district manages its own affairs. Although the sending district pays the bills for any students it sends, its citizens have no vote on who sits on the receiving district's board of education or how the money should be spent. Before leaving this topic, mention should be made of the upcoming reorganization plan to move the Englewood eighth graders to the DMHS facilities. (See footnote 3, *supra*.) Unfortunately, the Englewood Board failed to consult with the Cliffs Board about this important change prior to its adoption. Mrs. Geiger, president of the Cliffs Board, first learned of the impending reorganization when she happened to attend a meeting of the Englewood Board. Later, she read about the adoption of the plan in the newspaper. Cliffs parents are understandably apprehensive that their ninth graders will be socially isolated by entry into a new school environment where friendships have been forged before their children's arrival.

I **FIND** that the Cliffs Board of Education has genuine educational reasons for wanting to terminate its sending-receiving relationship with the Englewood Board and to enter into a new sending-receiving relationship with the Tenafly Board. Among the reasons why the Cliffs Board might legitimately prefer THS are: (1) A more suitable academic program for most college-bound Cliffs students; (2) Less need for emphasis on discipline and more opportunity for student independence and self-reliance; (3) Nicer and newer school facilities; (4) A better stocked library; (5) Past administrative instability at DMHS; (6) Past failure by the Englewood Board to correct deficiencies over a period of years and (7) Inadequate consultation by the Englewood Board about an important matter affecting the Cliffs students. It is equally clear that Cliffs students at DMHS can get a good solid education which more than adequately prepares them for college and for later life. In addition, DMHS has a broader and more comprehensive curriculum,

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superior in certain respects to the more narrow focus of THS's curriculum, particularly for students interested in vocational careers or requiring special education services. Recently, the Englewood Board has made headway in correcting many of its past problems.

Accordingly, the Cliffs Board's request for relief is made in good faith, for what it conceives to be the best educational interests of its students. Next, then, this discussion will turn to an analysis of the potential negative impacts of severance in each of four categories: racial composition, educational quality, financial condition and facilities impact. For analytic convenience, the negative impact section will be based solely on the loss of the remaining Cliffs students attending DMHS now or in the immediate future.

D. Analysis of Potential Negative Impacts

1. Impact on Racial Composition

Although the expert evidence on this subject is highly technical, resolution of the issue ultimately depends largely on acceptance of one or the other side's projections of future white and minority enrollments. At their core, the differences are clear-cut and readily understandable. Both sides employ the "cohort survival ratio" method, which predicts future enrollment by tracking the historical progression of the same class of students from grade to grade. This method involves a pattern of "survival ratios" or quotients in which the denominator is enrollment in one year and the numerator is enrollment in the immediately succeeding year. Application of an average survival ratio to present enrollment figures produces an estimate of future enrollment. Initially, the parties diverge on the threshold question of how many years of enrollment data should be utilized and whether any adjustments are appropriate to account for recent trends. Then the parties reach a fundamental parting of the ways. The Englewood Board attempts to quantify what it anticipates will be the "secondary" loss of Englewood resident students in reaction to any decision allowing the Cliffs students to go elsewhere. The Cliffs Board objects, first, to the very concept of looking beyond the immediate loss of Cliffs students in

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determining negative impacts. Second, the Cliffs Board objects to the lack of any scientific basis for making such "extrapolated" withdrawal projections. Both sides also part company on the likelihood and magnitude of any "rebound" or return of Cliffs students to DMHS in the event that severance is denied and access to THS is blocked.

Dr. Mario Tomei, a professor of educational administration at Glassboro State College retained as an expert by the Cliffs Board, used three years of data or two ratios in making his projections of future Cliffs enrollment at DMHS.[11] Admittedly, the use of additional years of data would have projected a greater number of Cliffs students expected to attend DMHS and, hence, resulted in greater potential impact. Dr. Tomei's rationale for discarding older data was that the "prolonged drop" in enrollment appears to have "leveled off" in recent years, and that use of more than three years of data would not accurately capture current conditions. He admitted that what constitutes a "trend" is a "professional judgment" call, and in his report he himself made projections based on four or five years of data to compensate for particular years when enrollment seemed usually low (for instance, projections of Cliffs enrollment in the elementary grades). None of the parties has cited any recognized standard for determining how many years of data to use in an application for termination of a sending-receiving relationship, but the regulation coming closest to the situation supports Dr. Tomei's decision to base his projections on three

[11]In making his projections, Dr. Tomei used consolidated enrollment reports and state aid applications for the three most recent school years available at that time (1984-85, 1985-86 and 1986-87). These reports show enrollment data as of September 30th of each year. Consolidated enrollment reports and state aid applications for 1987-88 only recently became available and were marked into evidence after the hearings had ended.

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years of data.[12] The Englewood Board severely criticizes Dr. Tomei for having selected the three "low point years" of Cliffs enrollment at DMHS, which, in the opinion of its experts, reflect enrollments "artificially depressed" by local political campaigns, the Cliffs Board's vote to terminate the relationship and the willingness of the Tenafly Board to become a substitute receiving district. Instead, the Englewood Board advocates use of seven years or six ratios as the better basis on which to predict future enrollment.

Subsequent events have demonstrated that Dr. Tomei tended to overstate rather than understate future enrollment of Cliffs students at DMHS. When issuing his report in November 1986, Dr. Tomei projected that in 1987-88 a total of 28 Cliffs students would enroll in DMHS, distributed as six in the ninth grade, five in the tenth grade, four in the eleventh grade and thirteen in the twelfth grade. Actual enrollment figures now available for 1987-88 indicate that only 2l Cliffs students enrolled in DMHS as of September 30th, with just two Cliffs students in the ninth grade, three in the tenth grade, three in the eleventh grade and thirteen in the twelfth grade.[13] These 21 Cliffs students are composed of 15 whites, 4 Asians and 2 Hispanics. Since only 15 of the 21 Cliffs students are white, immediate loss of the entire Cliffs contingent would decrease the number of white students at DMHS from 94 to 79. Out of a total DMHS enrollment of 799, the white proportion would fall from 11.8% to 10.2% or a difference of only 1.6%.

[12]*N.J A.C.* 6:3-3.1 (a), dealing with the analogous situation of withdrawal from a limited purpose regional school district, requires submission of projected enrollments "based on growth factors using average percentages for the last three school years." However, the Englewood Board points out that the Education Department's cohort survival worksheets have room for seven years of data or six ratios.

[13]This breakdown comes from the Englewood Board's 1988-89 application for state aid marked R-232. However, a letter from the Englewood Board counsel indicates that two numbers are reversed and the correct order should be three in the ninth grade and two in the tenth grade. R-234

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On the assumption that Cliffs students would be phased out over a four-year period, Dr. Tomei also projected the impact on racial composition in the school year 1990-91. According to his calculations, total enrollment at DMHS in 1990-91 would be 662 for grades 9-to-12 or 808 for grades 8-to-12. Inclusive of the Cliffs students, the projected white enrollment of DMHS would be 58 students in a 9-12 school or 61 students in an 8-12 school. Thus, without any withdrawal the proportion of white students at DMHS in 1990-91 would be 8.76% in a 9-12 school or 7.55% in an 8-12 school. As can be seen, the proportion of whites enrolled at DMHS is expected to decrease whether or not the Cliffs district is allowed to withdraw. Dr. Tomei projected 21 Cliffs students will be enrolled at DMHS in 1990-91, composed of 15 white students and six students of other races. Loss of the 15 white Cliffs students would reduce the proportion of whites at DMHS to 6.71% in a 9-12 school or 5.84% in an 8-12 school. Phaseout of the Cliffs students would cause a difference of only 2.1% in a 9-12 school or 1.7% in an 8-12 school.

Not surprisingly, the Englewood Board's expert, Dr. Jerry Jacobs, took a different approach and reached very different results on the same issue. Dr. Jacobs, a professor of sociology and demographic researcher at the University of Pennsylvania, has impeccable academic credentials but no practical experience at the secondary-school level. If the Cliffs students were allowed to withdraw, Dr. Jacobs projected, by 1990-91 there would be only 530 students left at DMHS in grades 9-12. More to the point, he projected a racial composition only 3% white and 1% Asian, and a combined black and Hispanic enrollment constituting 95%, making DMHS "virtually all-minority, in a short period of time." Aside from his use of seven years of data or six ratios in making enrollment projections, the major difference in Dr. Jacobs' methodology is his assumption that 75% of the Englewood white and Asian students and 15% of the Englewood black and Hispanic middle class students will flee the district over a three-year period. Put another way, Dr. Jacobs did not consider the loss of Cliffs students alone, but also sought to quantify an alleged "secondary" loss of Englewood

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students in reaction to a termination of the sending-receiving relationship.

As support for his thesis, Dr. Jacobs relied on documentation in social science literature and the opinions of other Englewood Board witnesses in this case, who generally concurred with his underlying premise. Essentially, Dr. Jacobs asserted that a decision by the Commissioner in favor of severance would be perceived as a "signal" that DMHS is not a quality school which, in turn, would lead to massive abandonment of their own school system by Englewood whites and by middle class residents of all races. In Dr. Jacobs' view, the residents of Englewood would interpret the Commissioner's action as "a vote of no confidence in DMHS," regardless of the language in which the decision was couched. Support for this view is said to be derived from the scholarly literature on school desegregation and magnet schools, which shows a reluctance on the part of many whites to send their children to predominantly minority schools, a phenomenon often referred to as "white flight." How Dr. Jacobs arrived from this generalization to the precise numbers of 75% for whites and Asians and 15% for blacks and Hispanics is less clear, although other Englewood Board experts testified that his estimate was "reasonable but conservative." One expert in secondary education, Dr. Fleischer, went so far as to predict that white attrition would approximate 100%, a number which Dr. Jacobs had himself considered but rejected. Once again, the basis for such scientific exactness was obscure.

During cross-examination into the underpinnings of his theory, Dr. Jacobs conceded that most of the literature with which he was familiar involved studies of white resistance to court-ordered desegregation plans and mandatory busing, all of which are readily distinguishable from the present case where Englewood children are already attending a predominantly minority local high school by choice. Unlike the typical desegregation situation, the Englewood students currently at DMHS would not be relocated to an unfamiliar school outside their own neighborhoods. Even in those studies which quantify the extent of opposition to involuntary reassignment of students to achieve better

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racial balance, the numbers are smaller than the 75% proposed by Dr. Jacobs as the probable white and Asian exodus from DMHS. For example, the Rossell study of desegregation efforts in Boston, Baton Rouge and Los Angeles found, even in the controversial context of forced desegregation, that white attrition from schools with the highest minority concentrations averaged 55% in the first year and over 10% in the second year. In her study, Rossell indicated that Boston and Los Angeles were among the most "hotly contested" northern desegregation cases of those she had studied. Further cross-examination of Dr. Jacobs elicited numerous distinguishing features of the Rossell study, such as lower rates of white attrition in schools which, like DMHS, have a lower concentration of minorities and the fact that white flight is greater at the elementary level than in high school.

In further support of his views, Dr. Jacobs alluded to the New Brunswick experience, where the proportion of minority (black and Hispanic) enrollment at the high school increased from 65% in 1975-76 to 95% in 1986-87, following severance of a sending-receiving relationship with two largely white neighboring districts.[14] Superficially such comparison may seem persuasive, but in reality the two situations are totally different. New Brunswick is an urban community with a relatively low-income population, low-cost housing, and, at the time of severance, a serious overcrowding problem in its school system. Englewood is an affluent community with expensive homes, a broad tax base, and an improving educational program. There is inadequate reason to assume that the same high degree of attrition experienced by New Brunswick in the last nine years will necessarily be repeated in Englewood, which possesses the means to keep its students in its own school by raising educational standards.

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[14] *New Brunswick Bd. of Educ. v. North Brunswick Bd of Educ.*, 1974 *S.L.D.* 962 (Comm'r 1974), aff'd 1975 *S.L.D.* 1110 (St. Bd. 1975) and *In re Application of the Milltown Bd. of Educ.*,1976 *S.L.D.* 854 (Comm'r 1976), aff'd 1976 *S.L.D.* 863 (St. Bd. 1976).

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Nor could Dr. Jacobs cite any relevant literature to support his blanket statement that the parents of Englewood would look only at the end result and ignore the reasoning of any Commissioner's decision. Moreover, Dr. Jacobs' position in this regard is inconsistent with his other testimony that parental perceptions of school quality are influenced by a variety of considerations, including whatever good news parents may have heard about a particular school. Dr. Jacobs did not personally talk with any Englewood parents or conduct any survey about their presumed intentions. Significantly, not one Englewood parent testified about plans to remove a child from DMHS if the remaining 21 Cliffs students were allowed to leave. Indeed, the two Englewood parents who did testify on the question both said that they would continue sending their daughters to DMHS, regardless of how this case happened to turn out. So, too, a 1987 DMHS graduate testified that his Englewood classmates, black and white, would be likely to stay at DMHS after the Cliffs students had gone. In fact, the only evidence from which the occurrence of secondary loss might arguably be inferred was Mr. Segall's purely subjective impressions based on conversations with Englewood residents and Dr. Michelle Fine's account of her interview with selected students and an unidentified black DMHS administrator. But Mr. Segall also spoke of a small number of "socially committed" Englewood parents who "would probably keep their children in the public schools." None of this impressionistic evidence supplies the empirical data necessary to quantify any secondary loss. Mr. Segall admitted as much himself when he said that he could not quantify the secondary loss, although he believed it would be "substantial."

Most of the experts, including Dr. Jacobs, agree that there are strategies which school districts can employ to counteract or minimize the extent of white flight, such as the creation of magnet schools designed to attract students to a particular school on a voluntary

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basis.[15] Articles in the learned journals by Rossell and others have verified the effectiveness of such noncoercive techniques. Englewood superintendent of schools Larry Leverett described the success of the magnet school concept in Montclair.[16] Dr. Jacobs failed to factor into his estimates of secondary loss the effect of the reforms already implemented by Mr. Segall and other steps which might reasonably be taken to build greater support for DMHS from within the Englewood community.

Other experts took a more realistic approach to the nature of the process by which parents decide to what high school their children should go. Dr. Smoley, the Tenafly Board's educational expert, thought that "a lot of things" entered into a parent's decision, particularly the individual's own prior experience "filtered primarily through the perceptions of other parents and students." Speaking frankly, Dr. Smoley stated his opinion that the Commissioner's decision "would not bear a high degree of weight" on where parents decide to send their children. Dean Herbert London of New York University, a witness with conservative ideological leanings, envisioned the decision-making process as a rational cost-benefit calculation in which parents balance the importance of a number of items that can affect the quality of education. Some of the Englewood Board's own witnesses recognized that the choice of a school is not dictated by any single consideration. Thus, Dr. Evans remarked that the success of a student in a particular

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[15] While recognizing the efficacy of magnet schools in large districts with multiple high schools, Dr. Jacobs did not think the concept could be meaningfully applied to a single high school district like Englewood because the concept runs counter to the notion of a comprehensive high school and because of doubts whether the Englewood district would have sufficient resources to sustain the more costly program.

[16] Montclair High School has a "school within a school" approach which offers specialized opportunities not traditionally provided to students in a regular comprehensive high school. According to Leverett, the Montclair district has been able to maintain a multi-racial, multi-ethnic and socioeconomically diverse student population.

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school depends on whether his parents "buy into the school's educational goals and mission."

I FIND that, because DMHS is so precariously short of white and Asian students, loss of even a small number of Cliffs students would have a significant impact on racial balance. Seen as a drop in the overall proportion of white students at DMHS, the loss of 15 white Cliffs students would make a difference of 1.6%, seemingly a negligible amount. However, these 15 white students constitute 16% of the total of 94 white students presently at DMHS.

The best estimate of enrollment in the foreseable future came from Dr. Tomei, who used three years of recent data which most accurately reflect current enrollment trends. Projections to the year 1990-91 indicate the loss of 15 white Cliffs students in that year would make a difference of only about 2% in the proportion of whites attending DMHS. Again, however, these 15 white students would constitute approximately 25% of the total number of white students projected for either a 9-12 or an 8-12 high school. Even if one accepts Dr. Tomei's figures, the impact on racial composition must be regarded as substantial in a school with such a low white and Asian population.

Use by Dr. Jacobs of seven years of data in projecting enrollment is not improper, but presents an unduly optimistic picture of what may reasonably be expected in light of most recent experience. Furthermore, Dr. Jacobs' dire prediction of wholesale abandonment by Englewood white and middle class families of their own good school system is sheer speculation, unsubstantiated by adequate facts and based on false analogy. Undoubtedly some amount of "secondary" loss would occur if severance were granted, but Dr. Jacobs has not provided a credible basis for quantifying that amount.

More fundamentally, the "secondary" loss argument proves too much. It places an impossible burden in the path of any sending district dissatisfied with the quality of education its children are receiving. Carried to its logical absurdity, the Commissioner of Education would never be able to grant severance from the worst receiving districts, for

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fear of creating a panic among the local inhabitants. While a sending district may rightfully be held responsible for any negative impact caused by the withdrawal of its students, it should not be blamed if the receiving district's population does not support its own school system.

2. Impact on Educational Quality

Declining enrollment causes staffing and scheduling headaches for school administrators. These problems hit hardest the small classes with marginal enrollment, such as advanced placement courses and "singletons," those classes where low student demand makes it impractical to schedule more than one section of a specialized subject. Single-section courses increase the chance of scheduling conflicts for students who must take another course given at the same period. Lower enrollment can also lead to disappointment, when student turn-out is so low that a course must be canceled, or to job dislocation, when a reduction of staff is necessitated by a cutback in the number of classes offered. Since both Englewood and Tenafly are experiencing declining enrollment at the high school level, both face this same difficulty to a greater or lesser degree.[17] Indeed, the major reason that the Tenafly Board is so willing to welcome students from other districts is its effort to counteract the adverse effects of declining enrollment at THS.[18]

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[17]The problem of declining enrollment is less acute in Tenafly. Due to an influx of families with young children, enrollment at the elementary level has increased continuously since 1983 and will eventually work its way to the high school. Tenafly school officials expect enrollment at THS, now at 891 including tuition students, to peak at "right around 900" by 1988-89 and to stabilize at "slightly under 900" in the early 1990s.

[18] Public policy in New Jersey prohibits "robbing Peter to pay Paul" by pitting the educational needs of the potential receiving district against those of the existing receiving district. As articulated in *Brielle Bd. of Educ. v. Manasquan Bd. of Educ.*, No 10-85, slip op. at 13 (St. Bd. Aug. 7, 1985), the State Board will not approve withdrawal "in order to bolster the declining enrollment of a potential receiving district." Hence, in *Brielle*, withdrawal was authorized "because Manasquan is overcrowded and not because Pt. Pleasant Beach is underutilized." *Id.* at fn. 5.

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Assessment of the educational impact depends very much on the enrollment assumptions of the person doing the assessing. Mr. Segall, who adopts Dr. Jacobs' secondary loss analysis, foresees a DMHS left with "the poor, the underachievers, the ones who have no options." Educational quality will then go spiraling downward in a "snowball effect," which is "very difficult to turn around, if not impossible." In Mr. Segall's estimation, the breadth and richness of the DMHS curriculum will be decimated by a paring down of the elective program. DMHS's foreign language department is already encountering difficulty sustaining "a full range of program." Cutbacks would also put advanced placement and honors courses in jeopardy, especially in light of the disproportionately high number of Cliffs students enrolled in such courses. While Mr. Segall does not expect any "sudden drop" in quality, he anticipates a gradual "erosion" over the next four years, reducing the number of advanced placement offerings by half and eliminating the honors physics course. Mr. Segall further points to the loss of "academically motivated" and high-achieving students from Cliffs, many of whom serve as role models and peer leaders for their fellow students. Literature on school desegregation also makes reference to maintenance of a "critical mass" of high-achieving students as contributing "not only to the achievement of these students but of students who have been lower achievers." Other Englewood Board witnesses paint an equally bleak picture. Dr. Evans predicts that severance would mean a loss of teachers, an increase in class size and an "across-the-board" scale-down of the curriculum. Dr. Fleischer sees scheduling becoming "increasingly difficult" in a smaller school and educational opportunity becoming "more limited."

Educational experts who embraced Dr. Tomei's enrollment analysis reached the opposite conclusion, that the impact on quality of education would be well within tolerable limits. EAA's expert in curriculum and instruction, Dr. Thomas Gallia, examined what the impact would have been on the advanced placement program if the 35 Cliffs students who attended DMHS in 1986-87 had not been present. He found little or no effect on five of seven advanced placement courses, since such a small number of Cliffs students were enrolled that

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their absence would not have made any noticeable difference. AP Biology and AP Spanish Literature were the only two courses where the absence would be felt because Cliffs students comprised roughly half the enrollment. At first Dr. Gallia indicated that there might be a "potential problem" with honors physics, but later he retracted that opinion upon learning that only two Cliffs students took the course in 1985-86. As a practical matter, the decision on whether to discontinue a particular course for lack of sufficient enrollment ultimately rests with the Englewood Board. In the past, the Englewood Board has offered many courses with fewer than ten students and, as admitted in answers to interrogatories, "has consistently supported the continuation of courses with low enrollment when the course is . . . of critical impact for the welfare of the school, i.e. advanced placement courses."

Tenafly consultant Dr. Smoley also approached the problem from the perspective of a loss of 35 Cliffs students in 1986-87. Assuming that the Cliffs students are evenly distributed among courses and sections at DMHS, Dr. Smoley estimated that "only five to seven course sections would be lost as a result of losing the 35 Englewood Cliffs students." Staff reductions, which Dr. Smoley put at the equivalent of 4.6 positions, "could be accommodated by slightly increasing class size which currently is quite low." The impact would be even less if the much lower 1987-88 Cliffs student enrollment figure is used.

An important educational component, which the Englewood Board is afraid might be sacrificed, is the value of diversity in the public schools. Almost every witness acknowledged the benefits of diversity in education. Although some regard them as the indispensable function of a public school, others treat them as a valuable adjunct to the learning experience.[19] Chief witness for the Englewood Board on this

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[19]New Jersey regulations incorporate the undisputed benefits of diversity as one of the state educational goals of a thorough and efficient education. *N.J.A.C.* 6:8-2.1(b)6 declares that, among other goals, the public schools shall help every student in the State "[t]o acquire the understanding of and the ability to form responsible relations with a wide range of other people including, but not limited to, those with social and cultural characteristics different from his or her own."

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topic was Dr. Michelle Fine, a knowledgeable professor at the University of Pennsylvania who holds a doctorate in social psychology. Dr. Fine testified that "social learning," defined as the skills of cooperative citizenship and learning to live with different kinds of people, cannot take place "in the absence of a diverse environment." According to Dr. Fine, it is not enough for people's negative attitudes about race to change. Social learning also requires a change in antisocial behaviors, which can only occur where there is opportunity to interact with people of other ethnic and cultural backgrounds. She did not think that exposure between white and Asian children of the same social and economic class would facilitate social learning, because racial tensions in the Northeastern United States are primarily "among blacks, whites and Hispanics." However, she would "never say that whites and Asians aren't learning from each other cross-culturally and in an interactively beneficial way" at THS. Counsel for the Tenafly Board objects to Dr. Fine's "lumping together" of white and Asians students, citing testimony that Asian students differ in terms of race, religion, culture and native language from the white majority, thus adding an extra dimension to diversity.

Cliffs experts pointed out that racial mixing alone does not automatically achieve better understanding and that educators must actively intervene to promote social learning. Dr. Falzetta, an EAA consultant in school administration, stressed that for social learning to happen a school must provide "organized and structured learning experiences" as part of its regular program and co-curricular activities. Similarly, Dr. Goldberg, the EAA expert in psychology, said that just because a school has a diverse population does not mean that different racial or ethnic groups will "really interrelate." Dr. Goldberg noted that adolescents of high school age often congregate in social cliques and do not necessarily form bonds to others with whom they don't "identify." As Dr. Goldberg put it, children acquire values from "vicarious models" as well as "direct" ones, and even a school with a low minority population can successfully convey social learning through its curriculum. In this regard, the THS curriculum covers material designed to increase appreciation of the heritage of blacks and other minorities,

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including a required ninth grade course on Afro-Asian history. Tenafly school administrators have introduced activities expressly to improve social learning, including a program instituted to combat anti-Semitism and a leadership retreat where students, chosen as a representative cross-section of the student body, practice communication skills and work together to solve mutual problems. THS also sponsors a wide array of co-curricular activities which foster positive contact with people of other races and nationalities, such as cultural clubs, community service organizations and international student exchanges.

In addition, the Englewood Board alleges that "symbolic losses" would result from severance of the sending-receiving relationship. Utilizing the tools of qualitative research, Dr. Fine conducted an in-depth study, which she described as an "ethnographic slice of life"at DMHS. Names of students to be interviewed were picked at random from a list "stratified"on the basis of geography and race. Based on her interviews with 28 students and 12 staff members, she concludes that symbolic losses would include demoralization of students and faculty at DMHS and a damaging blow to self-esteem and school pride. Her report is peppered with pithy excerpts from her interviews, supporting her opinion that severance would be taken by students as "a slap in the face" and a "devastating" step backward from an integrated society. A black female student from Englewood expressed disbelief that, after the advances of the civil rights movement, "they still judge you by color." Another black female Englewood student was resentful that "the whites hate us that much!" Interviews with administrators and teachers yielded similar emotion-laden quotations about whites wanting "to 'escape' " and severance destroying "the spirit, the spark created by diversity." One white teacher of 36 years summed up his reaction by saying that, while the loss of "a few white faces" would not be great, severance would send the wrong "signal" and "be terrible for morale, black and white." Because her study involved so small a sample, Dr. Fine was careful to issue a disclaimer that the results "do not permit [her] to generalize to <u>all</u> students, administrators or teachers at DMHS." Nevertheless, in her professional judgment, her data were

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"sufficient to provide a reliable sense of student and teacher experience at the school."

I FIND that severance would have a substantial negative impact on the quality of education at DMHS, much greater than any material loss caused by the withdrawal of 21 Cliffs students. In effect, any material losses would be greatly magnified by symbolic losses.

Departure of 21 students, in and of itself, would not seriously impair the educational program at DMHS. Reasonable minds may differ as to what size is "ideal" for a high school, but even a small school of under 800 students is capable of sustaining a quality educational program. Since the Englewood Board possesses the prerogative of reallocating resources to preserve particular courses or to implement other educational priorities, it is speculative to hazard any guess as to which specific courses might be affected by the withdrawal of 21 Cliffs students.

However, Dr. Fine's excellent study substantiates that "any material losses pale by comparison with the symbolic losses" which DMHS would suffer if severance were approved. As that comment implies, the sticking point here is not so much the actual loss of a few students, but what that loss would signify. Those left behind at DMHS would perceive the result as an implicit message that the school is not good enough for whites and Asians, but is acceptable for blacks and Hispanics. Feelings of isolation and inferiority engendered by such perceptions would lower the self-confidence of minority youngsters and be detrimental to their trust in the basic fairness of the educational system. Speaking as a trained psychological observer, Dr. Fine stated that the reaction of black students to this litigation goes beyond mere "disappointment." Black students to whom she spoke uniformly viewed the situation as "betrayal" by the one public institution to which they belonged. Reemergence of the stigma of inferiority associated with segregated school systems would be a regressive development for public education in New Jersey and would have serious repercussions far beyond the immediate parties to this case. Policymakers at the state level must give careful consideration to the

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negative implications severance would have for future race relations and social cohesiveness, not only at DMHS but also in other schools throughout this state.

To make matters worse, the Cliffs students are not evenly distributed among all socioeconomic groups and ability levels at DMHS. Rather, as Mr. Segall confirmed, the Cliffs contingent represents a disproportionately large number of upper income and high-achieving students who help to motivate and set an example for economically deprived and lower-achieving students. Loss of these particular students, therefore, would have a much greater negative impact on educational quality than their number alone would suggest.

Any charge that the Tenafly Board is not meeting its regulatory responsibility to encourage social learning must be rejected. Proofs establish that THS, with its large Asian and Jewish student population, has a diverse enrollment in the areas of culture, religion and native language. Sufficient opportunity exists within the Tenafly public schools for students to associate and mingle with persons of ethnic and religious backgrounds different from their own, although exposure to blacks and Hispanics or to persons of different socioeconomic status is severely limited. Commendably, the Tenafly school administration does not leave social learning to chance alone, but plays an active role in teaching social learning skills as an integral part of the required curriculum and an essential function of its co-curricular activities. Yet the finding is inescapable that DMHS has a much richer mix of racial and socioeconomic types which contribute to a more stimulating environment and a greater potential for exchange of ideas. Cliffs students who abandon DMHS would be losing a very enriching environment which they would be unable to duplicate at the more racially and socioeconomically homogenous THS.

3. Impact on Financial Condition

Both the Englewood and Tenafly districts provide strong financial support for their school systems, with Englewood spending more per student than Tenafly. Cost per pupil for the high school program in

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1984-85 was $4,873 in Englewood compared to $4,704 in Tenafly. In 1985-86, expenditures per resident pupil averaged $6,314 in Englewood and $5,557 in Tenafly. School tax rates in the two communities "hovered around the state average," while Cliffs' greater property wealth enabled it to maintain a high level of education spending with a relatively low school tax rate.

As before, the major factual dispute between the parties boils down to the question of which enrollment projection to use in making the calculation of loss. Dr. Tomei, who projected an enrollment of 28 Cliffs students at DMHS in 1986-87, multiplied that number times a tuition rate adjusted for inflation to arrive at an estimated loss of $167,748 if all Cliffs students withdrew from DMHS in a single year. Under the more reasonable scenario of a phased withdrawal, he calculated that the tuition loss, "spread over a four year period," would total $140,892 by 1990-91 when withdrawal was complete. In either case, the loss to Englewood would amount to less than one percent of the current expense portion of its annual school budget, a percentage that would shrink in future years as the total budget grows at a faster rate. Expressed in terms of the effect on local Englewood taxpayers, Dr. Tomei figured that the increase in the tax rate to make up the difference in a phased withdrawal would be three cents per $100 of valuation or about $45 per year for a homeowner whose property is assessed at $150,000. In a damaging admission, Dr. Amatuzi, business administrator for the Englewood district, conceded that a loss of this magnitude would have "little impact" on the overall budget (which, in 1984-85, exceeded 16 million dollars). Dr. Amatuzi's admission is particularly telling because it represents his honest opinion as chief financial officer for the district, before any attempt to reconcile his everyday experience with Dr. Jacobs' theories.

Englewood's expert in school finance, Dr. Margaret Goertz of the Educational Testing Service of Princeton, New Jersey, adopted Dr. Jacobs' assumptions in making her estimates of monetary loss. Her "baseline" for measuring tuition losses was an imputed enrollment of 40% of the Cliffs graduating eighth graders, the highest number under

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Dr. Jacobs' "rebound" analysis. She postulated an additional reduction in state aid to the Englewood district, predicated on Dr. Jacobs' assumption of a "secondary" withdrawal of Englewood resident students. Ignoring any offsetting savings from the staff reductions anticipated by Dr. Evans, for one, Dr. Goertz insisted that a "small decrease" in enrollments "will not save the district the costs of any instructional staff." All told, Dr. Goertz estimated that the Englewood Board would lose revenues of "nearly $498,000 annually by 1990-91." Presumably, Dr. Goertz considers this annual loss as recurring indefinitely each year that the sending-receiving relationship is no longer in effect.

I **FIND** that the small diminution in revenues resulting from severance would not have a substantial negative impact on the Englewood district's financial condition. Dr. Tomei provided the best quantification of the amount of loss, estimated to be $167,748 if withdrawal takes place in one year or $140,892 if phased over four years. This sum is insubstantial relative to the multi-million dollar budget for the Englewood school district. Attacks on Dr. Tomei's expertise because of his "numerous errors and recalculations" are unavailing; the issue is not which expert is more facile with numbers, but rather which offers the more convincing rationale for his opinion. In that respect, Dr. Goertz relied exclusively on Dr. Jacobs' assumptions, previously discredited as speculative. Furthermore, the Englewood Board cannot have it both ways, predicting staff reductions for the purpose of educational impact, but denying any corresponding savings for the purpose of financial impact.

4. Impact on Facilities Utilization

Different numbers for the capacity of DMHS appear in various places on the record. The 1985 evaluation of the school facilities in Englewood by the Education Department gives the "calculated capacity" of DMHS as 1,254. That same number is repeated in two documents developed in February 1986 by the Englewood Board's facilities expert, Kenneth Albert: the long-range facilities plan ("total school capacity" of 1,254); and the five-year capital program 1986-1991 ("functional capacity" of

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1,254). However, in his facilities report prepared in November 1986 for this litigation, Mr. Albert used a "functional capacity" of 1,548 at 80% utilization or 1,400 at 70% utilization. The source of these higher numbers was a much earlier June 1979 master plan for the Englewood district ("functional capacity" of 1,548). Conveniently, the higher capacity enables the Englewood Board to argue that severance would cause more severe underutilization problems at DMHS.

Here again, the result turns on which enrollment projections are used. Assuming secondary withdrawal and a 9-to-12 high school, Dr. Jacobs projects enrollment of 530 by 1990-91. Compared to a capacity of 1,548, utilization of DMHS would be 34%. Assuming loss of the Cliffs students only and an 8-to-12 high school, Dr. Tomei projects enrollment of 790 students by 1990-91. Compared to a capacity of 1,254, utilization of DMHS would be 63%. Assuming the Cliffs students remained, Dr. Tomei projects enrollment of 808 students by 1990-91, increasing utilization to 64%. Therefore, severance under a phased withdrawal plan would make only a one percent difference in the utilization of DMHS. Dr. Tomei calculated similar differences in utilization of one to two percent for the years 1987-88 and 1991-92. In his deposition, Mr. Segall conceded that the impact of phased withdrawal on facilities utilization would be "minimal." In the event of immediate withdrawal, Segall indicated, "We may pick up one or two classrooms during the day."

Nobody contends that THS, which presently has excess capacity, would suffer overcrowding if the Cliffs students went there under a new sending-receiving arrangement.

I FIND that severance would have an insubstantial impact on facilities utilization at DMHS. The most appropriate figure for the capacity of DMHS is 1,254, the number used by the Education Department and by Mr. Albert himself prior to his involvement as an expert witness. Projections of future utilization of DMHS must include the Englewood eighth grade, in consideration of the Englewood Board's plan to have its eighth graders occupy a portion of the available space at the high school complex. For reasons already discussed in detail, projections of

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future enrollment should not include secondary withdrawal. Severance would thus make a difference of two or less percentage points in the utilization of existing DMHS facilities.

E. The Tenafly Board's Private Tuition Policy

The Englewood Board alleges that the THS private tuition policy causes harm to DMHS "by siphoning off white and Asian students from Englewood and Cliffs, thereby exacerbating declining enrollment and racial imbalance." Many of the facts surrounding the formulation and implementation of the Tenafly Board's tuition policy are not seriously in dispute. At a meeting in April 1982, the Tenafly Board adopted the policy to take effect beginning with the 1982-83 school year. As stated by the Tenafly Board, the policy was in response to financial pressures resulting from declining enrollment of its own and labor costs in excess of budget caps. Before adoption of the policy, the Tenafly superintendent of schools held a preliminary discussion with his Cliffs counterpart to explore the degree of interest in such a proposal. There is credible evidence, however, that the policy was not targeted for public school students, and, in fact, was originally thought likely to attract mainly students who would otherwise attend private school. No attempt was made to set a tuition rate that might appeal to any particular segment of the market. Instead, Tenafly charges the same rate for tuition students that it charges for Alpine students attending THS under a separate sending-receiving relationship. Currently, that rate is $5,480 per pupil for the 1987-88 school year.[20]

THS pursues a selective admissions process for nonresident students that is much like the admissions process of private schools. Candidates for admission must complete an application form, submit transcripts of previous academic and disciplinary records, authorize release of

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[20]This rate is less than the maximum allowable under the state formula. Although the state formula permits apportionment of a part of debt service, the Tenafly Board has not seen fit to pass along any portion of debt service to nonresident students.

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standardized test scores and obtain a recommendation from the principal of the prior school attended. Applicants and their parent or guardian must also appear for a pre-admission interview. Primarily, the Tenafly district is interested in healthy applicants with good grades and good attendance records. By and large, successful applicants are college-bound students as distinguished from vocational or educationally-handicapped students. In fact, Dr. Knueppel, Tenafly assistant superintendent, was unaware of any handicapped child ever admitted to THS under the private tuition policy. Acceptance is contingent on availability of space. If a child is accepted, the parent or guardian becomes responsible for transportation and payment of tuition. Scholarships do not exist for families who can't afford to pay. Official Tenafly Board policy declares that nonresidents shall be considered for enrollment without regard to "race, creed, color, national origin or ancestry, sex or religious affiliation." Nowhere on the record is there any direct evidence that THS purposely discriminates on the basis of race or other improper category.[21] Blacks, in particular, are not excluded by virtue of their race, as evidenced by the fact that THS accepted three black tuition students in 1984-85 and again in 1985-86. Nevertheless, the overwhelming majority of tuition-paying students at THS are white or Asian. Of 113 Cliffs students who attended THS through 1985-86, more than 97% were white or Asian. Only three such students were Hispanic. None were black.

Tenafly's private tuition policy is unusual. Considerably more nonresident students attend THS than attend other New Jersey public high schools. Of 234 New Jersey districts studied by Dr. Fleischer, almost 85% had no private tuition students in 1985-86. In 1985-86, THS enrolled 74 such students, more than three times as many as the next

[21]The Englewood Board contends that it was hindered in its proofs by the Tenafly Board's failure to maintain records of the total number and racial breakdown of applicants and rejected applicants, "which would be probative as to whether the tuition policy discriminates against blacks and Hispanics."

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highest secondary school, Princeton Regional, which had 27. Only 17 of the 234 districts had five or more tuition students. An informal survey of 20 Bergen County districts by the Tenafly Board reveals that in 1986-87 only two other high schools enrolled tuition students from Cliffs or Englewood. Leonia had two Cliffs and eight Englewood students. Northern Valley had one Englewood student. In the same year, Tenafly had 63 Cliffs students and 13 Englewood students.

Typically, public school districts have tuition policies designed to protect the continuity of education by accommodating students moving into or out of the district during the school year. Englewood, for example, limits its tuition policy to children of future or former residents. Some districts, Ridgewood for instance, extend attendance privileges to children of nonresident staff members without payment of tuition. As noted, Tenafly goes beyond these circumstances and opens its schools to qualified nonresident students in order to subsidize the expense of operating a high quality educational system. The undeniable success of Tenafly's policy is demonstrated by the number of people willing to pay tuition for the privilege of sending their children to THS. In the short time that the policy has been in effect, the total number of private tuition students at THS has grown rapidly from 20 in 1982-83 to 107 in 1987-88. Presently, 76 Cliffs students and 16 Englewood students attend THS on a tuition-paying basis, generating annual revenues of $504,160 for the Tenafly district.

Conflicting evidence was presented on the likelihood of any "rebound" or return of Cliffs students to DMHS in the event that the Cliffs Board loses this case. This question bears on racial and educational impact because of the Englewood Board's argument that current enrollment of Cliffs students at DMHS is depressed by the litigation and would increase once it becomes settled that DMHS will remain the receiving school. Dr. Jacobs sees such outcome as the Commissioner's stamp of approval on the quality of education at DMHS, which will persuade Cliffs parents to return their children to that school. In Dr. Jacobs' opinion, 20% of the Cliffs students would attend DMHS if the Cliffs Board's petition to sever the sending-receiving relationship is

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denied and the status quo is maintained. He describes this scenario as a "modest" rebound from abnormally low attendance patterns during the course of this litigation. Translated into total enrollment, Dr. Jacobs projects that by 1990-91 a 9-12 school would have 680 students, less than today but more than if severance were permitted. Racial composition would be 12% white, 5% Asian, and 84% combined black and Hispanic, approximately the same as now exists. If, however, the Commissioner were also to enjoin THS from accepting private tuition students, Dr. Jacobs expects a "substantial" rebound of 40% of the Cliffs students. Total enrollment in a 9-12 school would then increase to 718 by 1990-91, still below current levels. Racial balance would improve to 15% white, 6% Asian and 80% black and Hispanic.

Dr. Jacobs' projected 20% or 40% rebound is based on his interpretation of historical enrollment data. He does not regard the pattern of Cliffs enrollment at DMHS as an uninterrupted decline. Rather, he sees the enrollment pattern as having reached a "plateau" until enrollment dropped sharply in 1977-78 coincident with the Cliffs Board's prior unsuccessful effort to terminate the sending-receiving relationship. He sees enrollment as having retrenched to a second but lower "plateau"and then having dropped in 1983-84 due to developments culminating in this litigation. Since Dr. Jacobs considers the litigation to be primarily responsible for the present decline, he envisions a similar return to the pre-litigation levels if the Englewood Board prevails. Dr. Smoley, the Tenafly Board's consultant, agreed that parents' choices could be influenced by their predictions of which side will win the pending litigation and, in that sense, a victory for the Englewood Board would make it more likely for Cliffs students to attend DMHS.

To counter Dr. Jacobs' rebound testimony, the Cliffs Board proposes to rely on a public opinion poll purportedly showing that few Cliffs parents would return their children to DMHS even if THS is enjoined from receiving them. The Cliffs Board hired Penn & Schoen Associates, a public opinion organization with extensive experience in poll-taking for industry and candidates for public office, to conduct a telephone survey

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of the attitudes of Cliffs residents toward DMHS. Dr. Douglas Schoen, a partner in the firm, described the "random digit dialing" procedure used, which involved computerized generation of random numbers to ensure that every telephone subscriber had an equal chance of being selected for interview. Additional interviews were conducted with three categories of pre-selected Cliffs households, those with children presently in the Cliffs elementary school, with children presently attending THS, or with children who went to DMHS within the last ten years. Penn & Schoen workers interviewed a total of 592 persons in May and June 1986.

Results of the poll suggest that few Cliffs parents intend to send their children to DMHS under any circumstances. Those who had children at DMHS in the past gave the school higher ratings than those with children at DMHS now. Parents of children below high school age, the pool from which future enrollments must be drawn, gave DMHS "dramatically lower ratings." Of the parents with one child, 79% said they were "not likely" or "definitely would not" send their child to DMHS. A mere 11% were "likely" or "absolutely certain" to send their child to DMHS and 10% were undecided. Similar attitudes were expressed by parents with more than one child. As might be expected, parents who already have children at THS were more adamantly opposed to DMHS. Of the 26 parents in that category who were polled, 23 said they would send their children some place other than DMHS if the THS option were taken away. None of the remaining three said they would send their children to DMHS. Corroboration of the survey results comes from Dr. Knueppel, the Tenafly school official responsible for collection of tuition payments. In his informal contacts with tuition-paying parents, Dr. Knueppel encountered no one willing to return his child to DMHS if the THS option becomes unavailable.

The Englewood Board attempts to discredit the survey findings by claiming that advance publicity contaminated the results. Despite precautions by the poll-takers to preserve confidentiality, the Englewood Board contends that confidentiality was compromised by two newspaper articles. Three or four months before the poll, a local

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newspaper distributed free to all Cliffs households carried two articles from which a reader could ascertain for whom the poll would be taken and its avowed purpose. Although there is no way of knowing how many participants in the poll actually read these articles and, of those, how many made the connection to the poll taken months later, the Englewood Board suggests that the existence of these articles renders the poll results meaningless. Furthermore, the Englewood Board asserts that the poll results are tainted by a written announcement from the Cliffs Board sent to every Cliffs resident two weeks before the poll. Written with the prior approval of Dr. Schoen, the letter informed the public that the Cliffs Board had hired a survey firm "[a]s part of the litigation" and stated, "We are only interested in your honest opinion[.]" It also added, "There are no right or wrong answers to these questions."

Commenting on the alleged notice problems, Dr. Schoen explained that the letter is a standard practice in the polling business to assure the public that a reputable organization was undertaking the survey. Carefully worded language in the letter would, in his professional judgment, encourage persons to give their honest opinions. Naturally, a polling firm has no control over what an independent newspaper chooses to publish. But Dr. Schoen did not believe that the newspaper articles threatened the validity of his poll. Nothing in the articles could possibly have disclosed the contents of the questions, which had not yet been written. Experience also taught him that newspaper articles about survey research get "little attention and recognition" from readers, especially when three or more months intervene before the interviewing starts.

I FIND that the Tenafly Board has a novel tuition policy enacted to alleviate the adverse effects of its own declining enrollment. As applied to THS, the policy has many characteristics of a private school placement, including selective entry requirements, higher academic standards and payment of tuition. On its face the policy may not be racially exclusive, but whites and Asians, as a group, are better able to afford the entry fee. In practice, the policy has attracted a

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disproportionately high number of students residing in the neighboring communities of Cliffs and Englewood. Its practical effect is to drain upper income white and Asian college-bound students from DMHS, subverting that school's efforts to promote racial balance and luring many of its most academically talented students. Existence of the Tenafly tuition policy also creates social pressures among Cliffs students not to attend DMHS, even though it is the assigned public high school for Cliffs residents.

Factually it is immaterial to a determination of this case how many tuition students from Cliffs might decide to go to private or parochial schools after the Tenafly option is foreclosed. THS is not a private institution, regardless of how it has been conducting its affairs. While state education officials do not have the authority to prevent someone from attending a nonpublic school, they do have unchallenged constitutional and statutory responsibility for supervising the public education system. A pernicious practice in the public schools cannot be allowed to continue unchecked simply because otherwise some parents might decide to remove their children from the public school system. Fact-finding should deliberately avoid any inquiry into what choices parents might conceivably exercise if the state's strong policy against segregation in public schools is properly enforced. Otherwise, the process may be misinterpreted as tacit encouragement of flight from the public schools in order to circumvent the law. Thus, it is unhelpful - as well as unseemly - to engage in a numbers game regarding how many of the Cliffs or Englewood students now or prospectively at THS would otherwise go to DMHS. The key facts are that THS enrolls 76 Cliffs students and 16 Englewood students who, by all rights, belong at DMHS if they choose to attend public school. Tenafly's tuition policy seriously undermines the continuing ability of the Englewood district to provide equal educational opportunity to all its students.

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F. Regionalization

1. Potential Configurations

In the context of the present proceeding, the Englewood Board does not propose "to map out an exact detailed plan of regionalization." Instead, the relief sought is for the Commissioner to order the districts themselves, under his continuing supervision, to work out the specifics of any regional plan. Due to size limitations, neither DMHS (maximum capacity of 1,254) nor THS (maximum capacity in the range of 1,200 to 1,300) would be large enough by itself to accommodate the current combined student population of 1,690. Several potential configurations, however, would be worth exploring if the Commissioner were to order further study of the regionalization remedy.

One possibility would be to use both the DMHS and THS facilities as they presently exist. Enrollment could be divided according to grade level, with grades nine and ten in one building and grades eleven and twelve in the other building; or, two magnet or specialized schools could be created, one focusing on art and the humanities and the other on science and mathematics; or, each facility could contain a comprehensive 9-to-12 high school. To assign students to schools on the basis of where they live would only perpetuate the racial imbalance which the remedy would be intended to correct.

A second possibility would be to increase THS's capacity by building an addition to the present structure. Sufficient acreage is available at the THS site to comply with state requirements for a larger school building. Questions have arisen, however, as to the stability of the soil and underground water conditions, which can only be resolved by soil boring or other tests. THS is built on a former landfill area, but houses had previously occupied the same location before construction of the existing structure.

The third and last possibility would be the construction of a new high school building for the regional district. Problems associated with this

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option include the high cost of new construction and the difficulty of finding a suitable vacant site in an already highly developed area.

2. Concept of a "Single Community"

Prior to any discussion of the appropriateness of regionalization, consideration must be given to whether or not the three municipalities constitute "a single community" as that term is used in the case law.[22] Foremost among the proofs on this point was the Candeub study on the extent to which Tenafly, Englewood and Cliffs share "a sense of identity and common interests." As outlined by planning consultant Burton Cohen, the Candeub study examined the interrelatedness of the three municipalities along several parameters. Initially, it should be noted that the three communities are in close physical proximity and share common borders. DMHS and THS are less than two-and-a-half miles apart, which coincidentally happens to be the maximum distance beyond which busing of remote students to high school is mandated.[23]

Historically, too, all three municipalities have a common origin, each having originally been part of Old Hackensack Township which was subdivided into smaller areas. Long ago Englewood and Cliffs were one municipality, but they split in 1895 over an election contest. Tenafly, which had joined a number of more northern Bergen County villages to form Palisade Township, voted to incorporate separately in 1894,

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[22] The term "single community" derives from the leading New Jersey case on regionalization of school districts across governmental boundary lines, *Jenkins v. Morris Twp. Sch. Dist.*, 58 *N.J.* 483 (1971). There the Supreme Court took care to confine its holding to the narrow facts before it, involving two municipal entities separately incorporated "but with a single community without visible or factually significant internal boundary separations." 58 *N.J.* at 501. Contrary to *Jenkins* where the party resisting regionalization "did not dispute the interrelatedness between itself and the Town" (at 487), here that issue is very much in dispute.

[23] *N.J.A.C.* 6:21-2.3(a).

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ironically because of a reluctance to share school debts with other districts.

The Candeub study concentrates on socioeconomic differences between Tenafly and Cliffs on the one hand and Englewood on the other. As set forth previously in this decision (Section III, Part A), the Tenafly and Cliffs populations are largely "upper middle class and homogeneous," while the Englewood population is "diversified in racial composition, income and most other characteristics."

Evidence concerning transportation links between the three locales is inconclusive, and can reasonably be cited for support by either side. In the Candeub study itself, the authors note the absence of "direct road connections" between Tenafly and Cliffs, the presence of only one road linking Englewood and Cliffs, and the presence of two county roads and one local street connecting Englewood and Tenafly. Taken at face value, this would suggest a stronger linkage between the two receiving districts proposed for regionalization (Englewood and Tenafly) than between the sending district (Cliffs) and either possible receiving district (Englewood or Tenafly). On the witness stand, Mr. Cohen testified that high volume highways carry traffic "through" rather than between Tenafly and Englewood, except for one "minor" roadway that dead-ends in an Englewood residential area; that streets which appear on the map to connect Englewood and Cliffs in reality "do not exist" or have fallen into "disrepair"; and that parallel roadways straddle rather than cross the border between Englewood and Cliffs. According to Mr. Cohen, the "flow" of traffic west from Cliffs does not stop in Englewood but continues on to Teaneck and beyond. Still, he recognized that these three municipalities "are connected by major road systems, but that only Englewood has direct road connections with the other two," as if Englewood were the central hub of an interconnected transportation network. Public bus routes operate regularly between Englewood and both Cliffs and Tenafly, but passengers traveling between Tenafly and Cliffs must transfer in Englewood.

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Mr. Cohen, whose planning background includes land use and development, thought that housing in Tenafly has more in common with communities to the north and west than with Englewood to the south. In his view, housing patterns exhibit "a classic case of continued development" from Tenafly to the suburbs of Cresskill and Bergenfield. He likened the borderline between Tenafly and Cresskill to "one general subdivision" with imaginary legal boundaries "just superimposed on top." By contrast, density of housing is much greater in Cliffs than in adjacent Englewood. Cliffs is characterized by new houses built on small lots, Englewood by old houses on large lots.

As an integral part of the Candeub study, the Tenafly Board also commissioned a household survey, which supports the conclusion that the three municipalities are "separate and independent" and "do not constitute a single community." Unlike the physical layout of Morristown-Morris Township, where one central business district serves residents from both municipalities, here Cliffs, Englewood and Tenafly each have identifiable shopping areas within their boundaries. The survey establishes that, while consumers tend to purchase groceries and convenience items locally, most households in the three municipalities buy clothing and small appliances at shopping malls, like Paramus Mall, which serve the greater Bergen County area. Likewise, while few residents from one municipality work in either of the other two, the survey demonstrates that the majority of residents in all three commute to jobs in New York City.

With respect to public facilities, Cliffs and Englewood have shared the same public high school for longer than two decades. Informally, Tenafly has recognized some affinity with its neighbors by inviting students from Cliffs and Englewood to switch from DMHS to THS. Cliffs and Englewood residents jointly use the Englewood public library facilities, managed by a board of trustees which, by the terms of its charter, must include one Cliffs member. Englewood also serves as a regional center for delivery of medical services to residents from all three municipalities. Englewood Hospital, the only hospital in the immediate vicinity, is situated near the Tenafly boundary line. Survey

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responses indicate the "greatest area of interaction" in the category of medical services. A greater number of Tenafly and Cliffs residents visit doctors' offices in Englewood than in their home towns. Residents who attend religious services "remain predominantly within their own town[s]," except for Cliffs churchgoers who also attend services in neighboring Ft. Lee. Nevertheless, places of worship in Englewood are the "second highest preference" for Tenafly and Cliffs residents.

Other ties between the three municipalities are more attenuated. Parks scattered throughout the area, including one immediately north of the Englewood-Tenafly border, are open to the public, but the survey suggests most people prefer parks in their own municipality or outside of the entire region. People dining out at fast food or more elegant restaurants "either partake locally or go elsewhere in the area" other than the two next-door municipalities. Musical and theatrical performances presented at the John Harms Cultural Center in Englewood draw audiences from the three municipalities but from surrounding communities as well. Social interaction between the three municipalities is "relatively weak," with most residents visiting friends and relatives outside the study area. All three municipalities are served by the same sewerage authority, which operates countywide . All three have the same water company, which also supplies water to a large number of nearby towns. All three, as well as other Bergen County municipalities, are within the circulation area of the same newspapers.

I **FIND** that, apart from the accident of shared geography and history, Tenafly, Englewood and Cliffs are autonomous and distinct communities. They have existed as separate legal entities for nearly one hundred years. Each has its own downtown business center. Each has a work force which commutes primarily to New York City, not to each other. Housing patterns indicate greater similarity between Tenafly and the northern suburbs than between Tenafly and Englewood. Most commercial, social and recreational activities take place within each municipality itself or outside the area, with only minimum contacts occurring among the three municipalities. Transportation routes pass through Englewood enroute to Cliffs or Tenafly, but do not bind these

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communities into a single unit. Common use of utility services, newspapers, and medical facilities do not distinguish this particular relationship from that of other separate Bergen County communities.

3. Advantages and Disadvantages of Regionalization

Proper evaluation of the regionalization remedy entails a careful balancing of the advantages and disadvantages of the proposed course of action.

(a) Advantages of Regionalization

Certainly there are many cogent reasons why regionalization under these circumstances might be beneficial:

(1) Regionalization would create a racially balanced school population of approximately 60% whites and Asians and 40% blacks and Hispanics, provided that there would not be extensive defection by parents unwilling to send their children to a forced regional district. Dr. Jacobs projected no white flight in a regionalization scenario based on his assumption that the two conditions known to cause white flight (a predominantly minority school and a negative parental perception of quality) would not be present. Dr. Evans, who had professional experience with school desegregation in Pittsburgh, was reluctant to say there would be absolutely no white flight; but, for essentially the same reasons as Dr. Jacobs, she thought that the amount of any white flight would be insignificant. Tenafly schools superintendent DeGrow anticipated widespread resistance to forced regionalization on the part of Tenafly residents.

(2) Consolidation would provide "automatic affirmative action" for the predominantly white staff at THS by merging it with the racially integrated staff at DMHS.

(3) By combining complementary strengths and offsetting weaknesses of the two current programs, a regional high school would be able to offer a broader and richer educational program than is possible in a smaller school. Students would have a greater course

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selection from a comprehensive curriculum including advanced and honors courses, vocational courses and special education courses.

(4) Combined enrollment would counteract the mutual problems of declining enrollment, leading to greater flexibility in scheduling, avoidance of staff cutbacks and expanded co-curricular opportunities. This might end the inter-district struggle to maintain enrollments and replace the present situation of two small schools becoming smaller.

(5) Increased diversity in a regionalized setting would provide opportunities for comprehensive social learning to a greater extent than separate schools, one almost entirely white and Asian and the other predominantly black and Hispanic.

(6) Scholarly literature suggests that exposure to higher-achieving students might improve the academic performance of some lower-performing students. Desegregation is most beneficial, however, when it is begun in kindergarten rather than in high school, when an entire metropolitan area is included, when rigid tracking is avoided and when the desegregated school is predominantly, but not overwhelmingly, white. Only the last condition has any chance of being satisfied in the proposed regional district.

(7) Through pooling of financial and human resources and economies of scale, the regional district might achieve cost efficiencies unavailable to each district individually. Facilities expert Kenneth Albert identified areas where duplicate services could be eliminated or other savings realized in a larger school system.

(8) Cliffs residents would gain representation on a regional school board, while they would remain "disenfranchised" in any sending-receiving relationship.

(b) Disadvantages of Regionalization

Against these advantages must be balanced a series of imposing disadvantages:

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(1) There is a serious risk of causing irreparable harm to existing excellence. THS is delivering a high quality of education and DMHS is making significant strides toward improvement. Regionalization would substitute an unknown for a known quantity, and may well destroy what good has been accomplished without achieving the theoretical benefits.

(2) Clashes between two totally different school cultures and climates would make managing a regional school exceedingly difficult. Right now THS emphasizes student independence and creativity while DMHS emphasizes discipline and adherence to rules. Assimilation of these cultures, in Dr. Smoley's opinion, "would be a time-consuming process and would meet with resistance from students, faculty, administrators and parents."

(3) Administrators would find it more difficult to design programs to meet the specific needs of a "bipolar" student body, that is to say a diverse group of students composed of fast learners and slow learners.

(4) Efforts to individualize instruction by "tracking" or ability-grouping of students are likely to undermine the expected benefits of diversity and, at its worst, could lead to segregated groups of students coexisting in the same school building.

(5) Student participation in academic and co-curricular activities is likely to decline in a larger school, due in part to the "crowding out" of more marginal students. For instance, a less athletically talented youngster would stand a better chance of making the varsity football team in a small school than in a larger one. Such narrowing of opportunity would be repeated in various academic and co-curricular pursuits.

(6) Coordination of curriculum from the lower through the upper grades, known as "vertical articulation," becomes more problematic when it is necessary to plan for separate school systems, especially those as divergent in goals and objectives as Tenafly and Englewood.

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(7) Local control of the school system would become more diluted for Tenafly residents, who would be required to share decision-making power with other districts in a regionalized district.

(8) At the present time, both Englewood and Tenafly have a high level of community support for their school systems. Regionalization threatens to erode public support for a school system seen as remote. Dr. DeGrow testified from his experience that it is harder to get voter approval of budgets in a regional high school district because of competing elementary districts "all vying for the same money."

(9) Need for busing of students will increase in a regional district; however, the amount of busing could be kept at a minimum, due to the close proximity of the three municipalities and the nearness of DMHS and THS to each other.

(10) Regionalization would add an extra layer of bureaucracy. Now there are only three districts. After regionalization, there would be four: the new regional high school district and three local K-to-8 districts.

(11) Start-up costs for a new regional district would be high. Uncertainty about the configuration of any regional district makes these costs difficult to quantify with any exactness, but Dr. Smoley and other Tenafly witnesses offered "order of magnitude" estimates of such expenses. Naturally, the most costly option would be to build a completely new school building, which the architect George Johns put at 24 to 28 million dollars for construction costs plus an additional 14 to 28 million dollars for land acquisition. No estimates were given for building an addition onto THS, because the Tenafly Board does not consider that a realistic possibility. Expenditure of considerable time and money would be required to develop new rules and regulations, revise the curriculum and instructional program, and retrain the staff. Dr. Smoley placed these costs at anywhere from one to two million dollars over a three- to five-year period.

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five central office administrators, together with support staff, and as many as 15 building-level administrators to run two schools, at a net annual cost increase of nearly $260,000 at current salary rates.

(13) Students attending the new regional district during the transition period will suffer an "opportunity cost" until the initial upheaval is over and the new district is running smoothly. Dr. Smoley estimates that this transition will take two years. For students caught in the change, this is the only time in their lives that they will be going to high school.

(c) Cost-Benefit Analysis of Regionalization

I **FIND** that the disadvantages of regionalization substantially outweigh the advantages. Greatest weight should be given to the risk of causing harm to two functioning districts without obtaining sufficient corresponding benefits. The whole will not necessarily be better than the sum of its parts. It is difficult to imagine forcibly merging two such different high schools without provoking much turmoil and acrimony. Call them "challenges" or "short-term" adjustments if one likes, but nevertheless the disadvantages resulting from regionalization would divert the energies of administrators and teachers from their main job of educating children. Even if one accepts the Englewood Board's contention that the cost estimates of the Tenafly witnesses are grossly exaggerated, the money still would be better spent on improving educational opportunities in the existing districts. As previously indicated, the decision on what is the right course of action must not be based on fear of local opposition to the law. But if the main rationale for the regionalization remedy is to improve racial balance in both schools , then the Englewood Board has not put on a very convincing case that regionalization is the best solution. If the desegregation literature teaches us anything, it is that forced merger of two districts, one predominantly white and one predominantly black, carries the greatest risk of white flight.

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(12) Incremental costs of operating a regional district would also be great. Just how great would again depend on the particular configuration chosen, there being more operational costs if the regional district operates two school buildings rather than one. Pursuant to Dr. Smoley's rough estimates, a regional district will need five central office administrators, together with support staff, and as many as 15 building-level administrators to run two schools, at a net annual cost increase of nearly $260,000 at current salary rates.

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IV. Conclusions of Law

Amended effective November 24, 1986, *N.J.S.A.* 18A:38-13 retains the requirement that an existing sending-receiving relationship at the high school level shall not be "changed or withdrawn . . . except upon application made to and approved by the [C]ommissioner." The amendment deleted language of the predecessor statute, which had conditioned the Commissioner's approval upon a showing of "good and sufficient reason." In its place, the new statute substituted a provision that the Commissioner "shall grant the requested change . . . if no substantial negative impact will result therefrom." Clarifying language also added a new statutory standard:

> The [C]ommissioner shall make equitable determinations based upon consideration of all the circumstances, including the educational and financial implications for the affected districts, the impact on the quality of education received by pupils and the effect on the racial composition of the pupil population of the districts.

According to the legislative history, the purpose of the amendment is "to modify the standard applied by the Commissioner of Education when considering requests to alter or terminate sending-receiving relationships between school districts." *Statement of Senate Educ. Comm. attached to Assembly Bill No. 2072 (1986).* In its final form, *N.J.S.A.* 18A:38-13 further provides that a district seeking to sever a sending-receiving relationship must conduct and submit a feasibility study prior to its application.

The only legal issue on which the parties can agree is that this case is governed by the new rather than the old law. As a general principle of statutory construction, the law favors prospective application of statutes to avoid unfairness to people who have acted in reliance on the old rules. *Gibbons v. Gibbons*, 86 *N.J.* 515, 522 (1981). Exceptions may be made, however, when the Legislature has expressed a contrary intent, when the statute is ameliorative or curative, or when the expectations of the parties warrant retroactive application. *Gibbons* at 523. Under the "time-of-decision" doctrine, appellate courts will apply

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the newer law when there is an intervening change that governs the disposition of issues on appeal. *Riggs v. Long Beach Twp.*, 101 *N.J.* 515 (1986). The purpose of the doctrine is "to effectuate the current policy declared by the legislative body - a policy which presumably is in the public interest." *Kruvant v. Mayor and Council of Cedar Grove*, 82 *N.J.* 435, 440 (1980). Courts have extended the "time- of-decision" doctrine to deliberations of administrative agencies, because "otherwise the administrative body would issue orders contrary to the existing legislation." *Ziffrin, Inc. v. United States*, 318 *U.S.* 73, 78 (1942).

Recently, in *Cranbury Bd. of Educ. v. Lawrence Bd. of Educ.*, No. 95-85 (St. Bd. April 1, 1987), appeal filed, No. A-4253-86T1 (App. Div. May 14, 1987), the State Board declined to apply the new law retroactively, "at least where the evidentiary proceedings had been completed and compliance with the statutory requirement would require relitigation of the matter." (slip op. at 24). But the posture of the present case is significantly different, in that all parties here were on notice of the changes in the law before the administrative hearings commenced. Absent any complaint from the litigants themselves, the most current policy pronouncements embodied in statute ought to control these proceedings, since they represent the latest legislative views on the subject. Nonetheless, it would be clearly unjust under the circumstances to impose on petitioner the precondition of a feasibility study, which requirement did not exist at the time that the petition was filed. In any event, the voluminous report of the EAA experts, although technically not in compliance because prepared after filing of the petition, can be regarded as substantially satisfying the statutory requirement of a feasibility study. Surely none of the parties' interests would be served by unnecessarily prolonging this lengthy proceeding, *see, Cranbury* at 25, or by adding to the paperwork of a record already overburdened by documentation.

Part of the confusion regarding the appropriate legal standard is due to the fact that the law governing dissolution of sending-receiving relationships is still evolving. Before passage of the recent amendment, the State Board had already begun to relax the proofs needed for a

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sending district to withdraw from a sending-receiving relationship. Earlier case law had required that the district seeking withdrawal bear the almost insurmountable burden of showing that the receiving district was not delivering a thorough and efficient education, a standard which the Cliffs Board's proofs fall far short of meeting in this instance. In *Washington Twp. Bd. of Educ. v. Upper Freehold Reg. Sch. Dist. Bd. of Educ.*, No. 93-82 (St. Bd. Dec. 7, 1983), the State Board eliminated that standard and, instead, held that the prior statute required only that the Commissioner "weigh all relevant factors," including negative impacts, to determine if good and sufficient reasons for termination had been presented. Since the sole basis for relief was alleged overcrowding and, on remand, the receiving school was found not to be overcrowded, the petition was ultimately dismissed for failure of proof. *Washington Twp. Bd. of Educ. v. Upper Freehold Reg. Sch. Dist. Bd. of Educ.*, Nos. 47-81, 93-82 and 123-84 (St. Bd. June 5, 1985), aff'd No. A-3164-84T1 (App. Div. Sept. 17, 1986). Later, in *Brielle Bd. of Educ. v. Manasquan Bd. of Educ.*, No. 10-85 (St. Bd. Aug. 7, 1985), the State Board indicated that its revised standard, a departure from earlier law, no longer required that "positive benefits" accrue to the high school students sufficient to overcome the "claims" of the receiving district to these pupils (slip. op. at 9). Declaring that overcrowding alone may constitute good and sufficient reason to permit withdrawal, the State Board reiterated that, once the petitioning district has demonstrated it to be in the educational interests of its students, "withdrawal will be permitted if no significant impact is shown." *Ibid.*

Cranbury, currently on appeal, contains the most authoritative State Board interpretation of *N.J.S.A.* 18A:38-13 prior to its recent amendment. There the State Board regarded the statutory scheme as "intended to benefit the students of sending districts" and as not conferring any right "to continue as the receiving district for a particular sending district indefinitely or to perpetuity." (slip op. at 9-10). Mindful of its dual responsibility to ensure stability in sending-receiving relationships and to effectuate local involvement in educational decision-making, the State Board interpreted the previous statute as requiring the sending district "to establish by a definite

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presentation of facts that there is an educationally based reason underlying its desire for withdrawal" (at 11-12). Also, the sending district has "the initial burden of producing some evidence that the withdrawal will not significantly impact the receiving district racially, educationally, financially or in the area of facilities." (at 12). Thereafter, the burden "shifts to the receiving district to demonstrate that it will suffer significant negative impact as the result of withdrawal." Such impact must be "definite and tangible." (at 14). On the merits, the State Board found in *Cranbury* that the sending district had established educationally based reasons for preferring one high school over another. Then the State Board went on to find that tuition loss from the phased withdrawal of 90 to 95 students would not significantly impact the finances of the receiving district, saying that "sending-receiving relationships are not intended to insulate receiving districts from financial constraints or its citizens from tax increases." (at 18).

As matters now stand, the amended version of *N.J.S.A.* 18A:38-13 relieves the sending district of any affirmative burden to prove "good and sufficient reasons" in order to justify the withdrawal. *Cranbury* at 21. It does, however, require the Commissioner to make "equitable determinations, based upon consideration of all of the circumstances" including (but not limited to) the negative impacts enumerated in the statute. Emphasis on the "equitable" nature of the determination, as well as reference to "all" the circumstances, not just those expressly mentioned, denotes that the Legislature intended the Commissioner to conduct a broad inquiry into all disadvantages associated with termination of the sending-receiving relationship. If the Legislature had wanted to limit the scope of review to the specific areas of impact listed in the statute, it could easily have said so.

In keeping with the precedent of prior decisional law, this decision has analyzed the negative impacts in terms of direct loss attributable to withdrawal of the Cliffs students attending DMHS now or in the foreseeable future, wi out taking into account any "secondary" loss of Englewood students or any imputed "rebound" of Cliffs students after

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this litigation is over. Even with such a narrow focus, however, it is painfully evident that DMHS would suffer substantial negative impact on educational quality if withdrawal were allowed. As more fully developed in the factual findings (Section III, Part D, Subsection 2), withdrawal would have an unacceptable demoralizing influence on the children remaining at DMHS, would be widely perceived as unequal educational treatment on the basis of race, and would wrongfully deprive DMHS of a disproportionately large number of high-achieving students essential to maintenance of academic excellence. *See Brown v. Board of Education*, 347 *U.S.* 483, 494 (1954) (invalidating the doctrine of "separate but equal" schools because that policy "is usually intepreted as denoting the inferiority of the [N]egro group" and because "[a] sense of inferiority affects the motivation of a child to learn.")

These losses are concrete, and demonstrable rather than speculative. They are detectable by reputable academic studies, such as the qualitative research performed by Dr. Fine, and are verifiable by the informed opinion of experienced school administrators, like Dr. Fleischer and Mr. Segall. Moreover, they are "definite," in the dictionary sense that they are "marked by the absence of the ambiguous, obscure, doubtful or tentative." *Webster's Unabridged New International Dictionary*, 592 (3rd ed. 1976). Similarly, they are "tangible," in the sense that they are "able to be perceived as materially existent" and are "substantially real." *Webster's* at 2337. (*But see also, Brown*, 347 *U.S.* at 493, holding that even "intangible" losses are relevant and must be considered when determining the adverse effects of segregation in the public schools.) Without more, these losses in themselves are enough to justify denial of the Cliffs Board's application. Recent State Board decisions do not support any different conclusion. *Cranbury* dealt only with negative financial impact. *Washington* and *Brielle* dealt with alleged or actual overcrowding of schools. None of them reached the issues of negative impact on racial balance or overall educational quality.

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Consideration of all the equitable circumstances must include a thorough examination of the Tenafly Board's private tuition policy and its detrimental impact on DMHS. This inquiry must be premised on the "long standing and vigorous" policy in New Jersey against racial discrimination and segregation in the public schools, expressed both in the state constitution, *N. J. Const.* (1947), Art. I, ¶5, and in state statute, *N.J.S.A.* 18A:38-5.1 *Jenkins v. Morris Twp. Sch. Dist.*, 58 *N.J.* 483 (1971); *Booker v. Plainfield Bd. of Educ.*, 45 *N.J.* 161 (1965) . *See also, Branchburg Twp. Bd. of Educ. v. Somerville Bd. of Educ.*, 173 *N. J. Super.* 268 (App. Div. 1980). Tenafly has been fishing in troubled waters. Bluntly stated, the Tenafly Board has adopted a tuition policy which has the clear effect of enticing white and Asian students away from a nearby public high school already experiencing racial imbalance, thereby contributing to a polarized situation. To accomplish its own ends, the Tenafly Board has instituted selective admissions requirements, including what is tantamount to an income test since only those who can afford to pay are eligible for admission. In what could accurately be called "cream-skimming," the Tenafly tuition policy achieves its intended purpose by attracting more highly motivated and academically competent students from its neighboring school district, at the expense of educational quality at DMHS.

In order to condemn Tenafly's beggar-thy-neighbor policy, it is unnecessary to establish that its adoption was the efficient producing cause of the decline in the number of Cliffs students at DMHS. (On the contrary, the evidence here tends to show that the beginning of the decline predated Tenafly's adoption of its tuition policy, although the decline has since accelerated.) It is enough that the Tenafly Board has set in motion a policy which exploits another district's weaknesses for its own benefit, thereby aggravating a bad situation. By the same token, it is unnecessary to find that the Tenafly Board was motivated by improper racial considerations in order to put a halt to the mischief it has made. Good intentions on the part of a wrongdoer "do not serve to negate the State's involvement in violation of a constitutional duty." *Norwood v. Harrison*, 413 *U.S.* 455, 466 (1973). "The existence of a

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permissible purpose cannot sustain an action that has an impermissible effect." *Ibid.* Tenafly is hardly in the position of an innocent bystander.

Not only is the Tenafly Board's policy "repugnant," it is also plainly against the law. *Asbury Park Bd. of Educ. v. Shore Reg. High Sch. Dist. Bd. of Educ.*, 1971 *S.L.D.* 221 (Comm'r 1971), aff'd 1971 *S.L.D.* 228 (St. Bd. 1971) is directly on point. In *Asbury Park*, the Shore Regional Board of Education had implemented a tuition policy remarkably similar to that instituted here by the Tenafly Board. Like the Englewood Board, the Asbury Park Board of Education, a receiving district, complained to the Commissioner that the tuition policy increased the potential for segregation at its public high school "by reducing the number of white students in attendance there" and created "a private school system at the expense of the taxpayers." 1971 *S.L.D.* at 222. Indeed, the circumstances in *Asbury Park* were far less compelling than our own, since only eight students who belonged at Asbury Park High School were tuition students at Shore Regional High School, whereas 92 tuition students at THS belong at DMHS. Nonetheless, the Commissioner viewed the deteriorating situation "with consternation," 1971 *S.L.D.* at 225, and issued immediate injunctive relief returning the eight students to their designated public high school for the coming school year. Although the Commissioner did not find any deliberate act by the Shore Regional Board to circumvent racial integration in the public schools, he credited Asbury Park's "warning" that the tuition policy would lead to "dire consequences" for the receiving district "caused by the withdrawal of selected students," all of whom were white. 1971 *S.L.D.* at 226.

One big difference between *Asbury Park* and the present case is the indication that Shore Regional's facilities were already overcrowded with its own students, a fact which, if true, might give rise to an inference that its motives for accepting additional out-of-district students were other than educational. However, the Commissioner stopped short of actually drawing that inference, and it is clear that the outcome is not dependent on that peculiar wrinkle. On review, the State Board forthrightly announced that "irrespective of the

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overcrowding issue, the determination was based upon the Commissioner's obligation under the constitution, laws and judicial decisions of New Jersey and the policies of the State Board of Education to combat and eliminate racial imbalance in the public schools." 1971 *S.L.D.* at 229.

If the Commissioner were to give his blessings to establishment of a new sending-receiving relationship between the Cliffs and Tenafly Boards, it would lend legitimacy to an illegitimate arrangement. In essence, it would put the official state imprimatur on what the Tenafly Board has done. *Brown v. Board of Educ.*, 347 *U.S.* at 494 ("The impact is greater when it has the sanction of the law[.]") Formalization of the relationship under state auspices would reward the Tenafly Board for its illegal tuition policy and create an incentive for other school districts to follow suit.

Relying on *N.J.S.A.* 18A:38-3, the Tenafly Board argues that the Commissioner of Education lacks legal authority to prohibit a local school district from setting its own conditions for admission of nonresident students. *N.J.S.A.* 18A:38-3 does confer broad discretion on local school districts to admit nonresidents to its schools "upon such terms, and with or without payment of tuition, as the board may prescribe." But the local board's discretion is not limitless and can be curtailed for abuse. Art. VIII, Sec. IV, ¶1 of the *N.J. Constit.* (1947) mandates a thorough and efficient system of free public schools for all New Jersey children between the ages of five and eighteen. General supervision and control of public education in New Jersey is vested in the Department of Education, *N.J.S.A.* 18A:4-1, -10, of which the Commissioner is chief executive and administrative officer, *N.J.S.A.* 18A:4-22. In the exercise of his supervisory powers, the Commissioner shall enforce all rules of the State Board, *N.J.S.A.* 18A:4-23, and, if advisable, shall inquire into the thoroughness and efficiency of operation of any public school, *N.J.S.A.* 18A:4-24. New Jersey's highest court has taken an expansive view of the powers of the Commissioner and the State Board. *In re Upper Freehold Reg. Sch. Dist.*, 86 *N.J.* 265, 274 (1981). *See also, Plainfield Bd. of Educ. v. Cooperman*, 105 *N.J.*

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587, 596-97 ("[S]pecific power can be inferred from the broad powers that are granted to the Department.") *Jenkins* at 504 ("The Commissioner has been appropriately charged with high responsibilities in the educational field and if he is faithfully to discharge them in furtherance of the State's enlightened policies he must have corresponding powers.") *Robinson v. Cahill*, 69 *N.J.* 449, 461 (Commissioner and State Board have "received a vast grant of power and upon them has been placed a great and ongoing responsibility.") Thus, the Commissioner possesses not only the power, but also the duty, to take decisive action whenever, as here, local board action clearly conflicts with overriding state policy and threatens to cause substantial harm to another local district. In the event of any true conflict between state constitutionally based polices in favor of racial integration in the public schools and local policies governing attendance by nonresidents, the state policy "would have to be given primacy." *Asbury Park*, 1971 *S.L.D.* at 229.

In re Jamesburg High School Closing, 83 *N.J.* 540, 549 (1980), cited by the Tenafly Board for the proposition that the Commissioner is without inherent authority to act "[w]here there exists reasonable doubt" as to his legislative authorization, is inapposite. *Jamesburg* involved the tenure rights of teachers transferred to a new district after closing of the school at which they taught. Since tenure is entirely a statutory status, the court held that the Commissioner cannot on his own confer tenure rights where none exist by statute. That is very different from saying in the instant case that the Commissioner has the necessary means to carry out unambiguous state law mandating a thorough and efficient education and prohibiting segregation in the public schools.

State education officials should resist any temptation to count heads of those Cliffs students who would not return to DMHS if the THS option is closed to them. Aside from the notorious unreliability of even the most carefully conducted public opinion polls, the possibility that many or even most Cliffs parents might choose private over public school is irrelevant to the legal issues of this case. Government does not

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stick its toe in the water or hold a plebiscite to determine whether or not a public school may adopt discriminatory admission requirements in contravention of strong state policy. *Cf,. Jenkins* at 492 (non-binding referendum criticized as an "illegal and improper abdication" of governmental responsibility). Granted that the state may not interfere with the constitutionally protected right of a parent to choose to send a child to private or religious school, *Pierce v. Society of Sisters*, 268 *U.S.* 510 (1925), it does not follow, either by logic or law, that parents possess the generalized right to choose THS or any other public school outside their own school district. Subsequent cases have stressed the "limited scope" of the *Pierce* doctrine, which simply "affirmed the right of private schools to exist and to operate." *Runyon v. McCrary*, 427 *U.S.* 160,177 (1976). *Accord, Norwood v. Harrison,* 413 *U.S.* at 462. Prohibiting a taxpayer-supported public school from behaving like a private institution will not threaten the independence of any private or parochial school. Whether or not a parent chooses to send a child to private or parochial school is no business of the state. What policies are followed in the public schools are a legitimate matter of state concern.

When fashioning an appropriate remedy, the Commissioner need not be timid out of any apprehension that Cliffs students who would have gone to THS will avoid DMHS simply by transferring to another public high school. Now that the ruling in *Asbury Park* has been forcefully restated, it should not be presumed that other public school districts will willingly break the law. Were that to happen, however, the Commissioner has a broad range of options to enforce his orders, including seeking the assistance of the courts or withholding state aid from an offending district, *N.J.S.A.* 18A:55-2. In *Asbury Park*, the Commissioner ordered that *all* students improperly at Shore Regional be promptly returned to Asbury Park High School, and the Englewood Board has the right to demand the same relief here. Graciously, however, the Englewood Board has requested the lesser relief of an injunction against new admissions to THS and has consented to allowing those Cliffs and Englewood students already enrolled at THS to continue through graduation. This will help minimize disruption to the education of students in the midst of the Tenafly program and give

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the Tenafly Board time to adjust to the unexpected loss of tuition revenues.

Denial of the Cliffs Board's petition for severance and issuance of an injunction against the Tenafly Board's tuition policy do not fully dispose of all claims, since the Englewood Board further contends that regionalization is the best remedy to improve education and enforce state policy against segregation. In *Jenkins*, the leading New Jersey case on involuntary merger of separate school districts across governmental lines, the New Jersey Supreme Court made repeated reference to the uniqueness of the factual circumstances. Early in its opinion, the Court started out by commenting that Morristown and Morris Township "remained so interrelated that they may realistically be viewed as a single community, probably a unique one in our State." (58 *N.J.* at 485). As previously noted, several pages later the Court went on to emphasize that its analysis dealt "not with multiple communities but with a single community without visible or factually significant internal boundary separations."(at 501). Within a few more pages, the Court repeated virtually the identical language and added that the record before it "overwhelmingly points educationally towards a single regional district rather than separate local districts." (at 505). Morristown and Morris Township have an unusual hole-in-the-donut shape (Morristown in the center is encircled by Morris Township) and the two share a common downtown area. Englewood, Tenafly and Cliffs are distinct geographic entities, each with its own commercial center. Clearly, then, *Jenkins* is distinguishable on its specific facts and it would take an extension to apply its reasoning to the present situation.

In the face of such abundance of caution in *Jenkins*, the Englewood Board urges that, in traditional judicial fashion, the Court merely refrained from delineating "the outermost reach of the policy it was announcing." *See Note, Racial Imbalance and Municipal Boundaries - Educational Crisis in Morristown*, 24 Rutgers L. Rev. 354 (1970) Possibly so, although it is perhaps significant that, in the almost seventeen years since *Jenkins* was decided, neither the courts nor the Commissioner has

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seen fit to order another involuntary merger of two or more school districts. *See New Brunswick Bd. of Educ. v. North Brunswick Bd. of Ed.*, 1974 *S.L.D.* 962 (Comm'r 1974), aff'd 1975 *S.L.D.* 1110 (St. Bd. 1975). (There have, on the other hand, been several court or agency ordered studies of regionalization between unwilling districts. *Branchburg Twp. Bd. of Educ. v. Somerville Bd. of Educ.*, 173 *N.J. Super.* at 276; *Bloomingdale Bd. of Educ. v. Butler Bd. of Educ.*, 1976 *S.L.D.* 944 (Comm'r 1976).) Therefore, the question becomes whether this case presents the right opportunity for the Commissioner to extend the *Jenkins* analysis to new territory.

Jenkins itself placed heavy emphasis on the fact that merger was possible "without any practical upheavals" and would be entirely "reasonable, feasible and workable." (58 *N.J.* at 505). For the reasons elaborated in the factual findings above (Section III, Part F, Subsection 3), here the potential risks of regionalization are greater than any potential rewards. In *Jenkins*, Morristown and Morris Township already shared the same high school facilities and regionalization simply altered the existing legal relationship while preserving the status quo. Here the facts are that Englewood and Tenafly operate very different high schools and regionalization would attempt to combine them in some yet to be determined way. Worst of all, regionalization would risk destroying what now seems to be working relatively well, without adequate assurance of replacing it with anything significantly better. On the assumption that the *Jenkins* remedy might well be stretched to cover new circumstances, this does not appear to be an appropriate factual setting in which to do so.

Last, the Cliffs and Tenafly Boards advocate the establishment of a "dual sending-receiving relationship" as a way of maximizing parental choice in determining what school their children shall attend. Freedom of choice is an appealing idea, and one that is currently under study by state education officials. *Annual Message to the New Jersey State Legislature by Governor Thomas H. Kean* (January 12, 1988). But, as proposed by the parties, a "dual sending-receiving relationship" would afford only Cliffs parents the choice of either THS or DMHS, while the

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Englewood parents would have no choice. Such preferential treatment, where whites and Asians living in Cliffs can choose but blacks and Hispanics living in Englewood cannot, must fail for one-sidedness and lack of mutuality.

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V. Order

It is **Ordered** that the Cliffs Board's petition for termination of the sending-relationship with the Englewood Board and for establishment of a new sending-receiving relationship with the Tenafly Board is hereby **denied**.

It is further **Ordered** that the Cliffs Board's petition for establishment of a dual sending-receiving relationship is hereby **denied**.

It is further **Ordered** that the Englewood Board's cross-petition for injunctive relief is hereby **granted**. The Tenafly Board is hereby directed to cease and desist from admitting to any of its schools on a tuition-paying or other basis any students who are residents of either Cliffs or Englewood, and also from interfering in any way with the attendance of such students at DMHS; provided, however, that students residing in Cliffs or Englewood who are currently enrolled in the Tenafly school system on the date of this decision may continue in that system through graduation.

And it is further **Ordered** that the Englewood Board's cross-petition for the establishment of a regional high school district is hereby **denied.**

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This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if **Saul Cooperman,** does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **SAUL COOPERMAN** for consideration.

April 18, 1988
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 10
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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BOARD OF EDUCATION OF THE BOROUGH OF ENGLEWOOD CLIFFS, BERGEN COUNTY,	:	
PETITIONER/CROSS-RESPONDENT,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENT/CROSS-PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF TENAFLY, BERGEN COUNTY,	:	
CROSS-RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions and reply exceptions were timely filed by the parties and have been thoroughly examined.

There is apparently no dispute that the legal standard embodied in the amended version of N.J.S.A. 18A:38-13 is to be applied in this matter notwithstanding the fact that the Petition of Appeal was filed prior to the enactment of the amendments. (Initial Decision, ante) The standard of review articulated in the current provisions of N.J.S.A. 18A:38-13 requires that when deciding whether to approve a request to sever a sending-receiving relationship, the Commissioner

> ***shall make equitable determinations based upon consideration of all the circumstances, including the educational and financial implications for the affected districts, the impact on the quality of education received by pupils, and the effect on the racial composition of the pupil population of the districts.***

If no substantial negative impact will result from the severance, the Commissioner is required to grant the requested change.

Upon review of the record and noting that no exceptions have been filed with respect to the ALJ's findings and conclusions that no substantial negative impact would result on either finances or facilities if severance were granted (Initial Decision, ante), the Commissioner adopts those findings and conclusions as his own.

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In order to reach an equitable determination in this matter, the Commissioner will now consider all the circumstances with respect to the two remaining areas for deciding a request for severance, namely, impact on racial composition and quality of education about which voluminous exceptions and reply exceptions have been filed. Once a determination on the question of severance has been reached, the issues of dual sending-receiving relationship and Tenafly's tuition policy will be addressed. For each of the above-cited areas of consideration, the parties' exceptions will first be summarized whereupon the Commissioner will render a determination on that area based upon his own independent review of the record including the initial decision, the exceptions, as well as the documentary and testimonial evidence.

I. SEVERANCE

A. ENGLEWOOD CLIFFS

The Englewood Cliffs Board avers that the ALJ's finding in the initial decision, ante, that genuine educational reasons exist for seeking severance "puts the lie" to Englewood's tactic to project racial motivation to the Cliffs Board and parents, a tactic which it argues is not grounded in law but in public relations and political machination and which is designed to distract the Commissioner from Englewood's old pattern of neglect and decline of Dwight Morrow High School (DMHS). It contends, inter alia, that the "genuine educational reasons" it has for seeking a new sending-receiving relationship with Tenafly include a litany of serious educational deficiencies which affluent Englewood could have and should have prevented. The Cliffs Board states that no one disputes New Jersey's laudable public policy against racial discrimination and segregation but it maintains that that policy is not implicated in this case. Rather, it argues, what is involved is "the most significant educational decision a district can make," namely, where its students will be educated. (Cranbury, supra, at p. 10)

The Cliffs Board indicates that it takes few exceptions to the ALJ's thoughtful and considered factual findings but it strenuously objects to his conclusions that significant negative impact on racial imbalance was proven and that educational quality at DMHS was impacted because of "symbolic loss." As to this, the Cliffs Board avows that such findings and conclusions are unsupportable in precedent and in law and are grounded in a well-meaning but unwarranted invocation of strong public policy against racial discrimination, averring that "sadly, after such a careful decision, [the ALJ] fell prey to Englewood's shrilly asserted distraction." (Cliffs Board's Primary Exceptions, at p. 5)

The Cliffs Board further argues that Englewood should not be held harmless from the inferior educational environment it presided over when the petition was filed. It asserts that notwithstanding the Johnny-come-lately improvement effectuated after the arrival of Mr. Segall as principal at DMHS, many serious

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problems continue referring to the listing recited by the ALJ in the initial decision, ante; the testimony of Englewood's former Board President about unacceptable student behavior, poor student attendance, incidents of vandalism and confrontations and fights among students (6/15 T-72-74, 117-119); and Englewood's "own damning confession of its own failures" in a document comparable to one of Tenafly's referred to by the ALJ in the initial decision wherein that district acknowledges that morale appears to be suffering at Tenafly High School (THS). The Englewood document (P-236) refers to the past decade as a period of real and perceived decline which resulted in widespread loss of confidence in public school education and a history of administrative changes leading to instability and other concerns regarding such things as continuity in management leadership, long-term goals, morale and adversarial labor relations.

The Cliffs Board goes on to argue that to deny severance is tantamount to rewarding Englewood for deficiencies and unwillingness to tackle problems and, worse, it "consigns those few Cliffs students who are unable to make alternative provisions to a school whose failures are manifest but over which their parents can assert no control to effect improvements." (at p. 9) Of this it states:

> ***It is one thing to expect a community which has failed to ensure excellence in its education, despite having the resources to do so, to live with its failures. It is quite another thing, however, to keep indentured to such failures a community, such as Englewood Cliffs, which has no responsibility for those failures, no say in the system, no ability to effect improvements. Yet that is just the effect of the Initial Decision's recommendations here.
>
> (Cliffs Board's Primary Exceptions, at p. 9)

The Cliffs Board asserts that the facts found in the initial decision do not warrant a conclusion, that withdrawal of the Cliffs students would result in substantial negative impact on DMHS. More specifically, it argues that a decrease of only 1.6% in the proportion of white students at DMHS is neither negative nor substantial and that the ALJ's decision that educational quality at DMHS would suffer "symbolic loss" is wrong and, in any event, falls far short of the "definite and tangible" negative impact required in this matter.

While the Cliffs Board fully supports the ALJ's rejection of Englewood Board's "secondary loss" argument advanced by Dr. Jacobs as to impact on racial imbalance, it contends that by finding a loss of 15 students or a 1.6% drop in the proportion of white students at DMHS would cause significant negative impact, the ALJ made a subjective finding going beyond witnesses and not supported by fact. As to this, the Cliffs Board avers that the ALJ should have carried his analysis further by pointing out that 12 of the 15 white students are seniors; therefore, the "real impact" is

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only 8 students of whom only 3 are white. (R-234; Cliffs Board's Brief (Pb), at pp. 58-59) The Cliffs Board questions if it is reasonable to find that the loss of 3 white students in 1988-89 would have a significant negative impact on racial balance and contends that unless a speculative "symbolic loss" is considered, there cannot be a "material loss" with so few students. As to this, it argues that:

> Carrying Judge Springer's holding to its logical absurdity (a process he employed to discredit the secondary withdrawal projection, supra at pp. 11-12), the Commissioner could never grant severance from the worst receiving districts if the districts did not have the same precise racial balance so that there would not be an increase in the nonwhite population (or a decrease in the white population) upon severance no matter how few students were attending the receiving school from the sending district. After all, in 1965 when the sending-receiving relationship between Englewood and Englewood Cliffs began, the racial composition of DMHS was probably between 62.2% and 73.3% white (Pb5), and yet the Cliffs public school population's racial composition as late as 1971 was 96.8% white, P/CR-1, p. 48 (Table 8). Since there would likely always be a larger proportion of minority students at DMHS than in Englewood Cliffs, no matter how few Cliffs students attend DMHS there will always be an impact, albeit small, on the racial balance of DMHS if any Cliffs students withdrew. In such a context, the Cliffs' community would be inextricably bound in perpetuity no matter how great the failings of DMHS and no matter how consistently Cliffs students abandon public education. Such a result flies in the face of State Board policy.
> (emphasis in text)
> (Cliffs Board's Primary Exceptions, at pp. 15-16)

As to the issue of educational impact, the Cliffs Board takes strong exception to the ALJ's acceptance of Dr. Fine's study to support negative impact on education quality based on "symbolic loss" as opposed to "traditional concrete indicia of educational quality such as reductions in force or curtailment of curriculum." (Id., at p. 16) It criticizes her study for such things as lack of randomness, small number of students, lack of precision as to what was said and the bias of students who knew the purpose of the study and the goal of the litigation. Moreover, it decries that in the initial decision, ante, the ALJ considers her study impressionistic evidence with respect to the quantification of any secondary loss in enrollment and 8 pages later this "impressionistic" study has become an "excellent study" much as in the initial decision, ante, the

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principal's testimony with respect to secondary loss was deemed "purely subjective impressions" and yet later it has become "the informed opinion" of an "experienced school administrator." Further, the Cliffs Board argues that if Dr. Jacobs' testimony on secondary loss was dismissed, so must the principal's informed opinion.

The Cliffs Board reiterates its argument that the circumstances in this matter differ from Jenkins, supra, because withdrawal of the small number of Cliffs students will cause only a minimal difference in racial balance at DMHS. It also contends, inter alia, that the ALJ ignored the facts elicited at the hearing when he determines that the loss of the Cliffs students would have a much greater negative impact on educational quality than their number alone would suggest because they include a disproportionately large number of upper income and high-achieving students who motivate and set an example for economically deprived and lower-achieving students. (Initial Decision, ante) In support of this, it points to the DMHS principal's testimony that even if every Cliffs student left that school, there would not be a significant impact on the number of students oriented toward academic achievement and that of the 20 acceptances to "Most Competitive" colleges received by the class of 1987, only one was a Cliffs student.

B. ENGLEWOOD

As may be expected, the Englewood Board urges that the initial decision be affirmed by the Commissioner and has submitted exceptions, a large portion of which it acknowledges "attempt to demonstrate additional reasons that support [the ALJ's] decision and, more particularly, that the impact of severance would be more pernicious than even Judge Springer's opinion reflects." (Englewood's Exceptions, at p. 3)

Initially, the Englewood Board avers that the Cliffs community's attitude toward DMHS has been tainted by racial prejudice and that many of its perceptions are misperceptions; therefore, it argues that allowing severance would be to give state sanction to improper racial attitudes and misperceptions and urges that severance should be denied for this additional reason. It also argues, inter alia, that this case does not turn on whether the Cliffs Board's request for severance was "in good faith," and that the issues in the matter are negative racial and educational impact with the ALJ's denial of severance well-supported by his findings on these issues. Moreover, it avers that there is a lot more to the petition for severance than the reasons offered by the ALJ as to why the Cliffs Board might legitimately prefer another high school, contending that where taint of prejudice and misperception burdens a severance request, it is not wiped clean by the possible existence of "genuine educational reasons."

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Next, while the Englewood Board strongly agrees with the ALJ's finding that severance would have a substantial negative impact on racial composition, it does except to the finding insofar as it alleges that the impact will be even greater than that determined by Judge Springer. In support of this contention, it avers that the ALJ's approach to the issue had too narrow a focus in that it failed to take into account any secondary loss of Englewood students or any rebound of Cliffs students after the litigation is over. It maintains that even the "undoubted" secondary loss of "some amount" conceded by the ALJ would constitute a substantial negative impact in itself where white and Asian students are so precariously short.

As to the ALJ's rejection of the secondary loss proofs, the Englewood Board argues that one does not need to quantify loss with "scientific exactness" any more than it would be necessary to quantify damages with precision once harm has been demonstrated. It also contends that Fleischer's and Segall's testimony should not be discounted when considering impact on racial balance. Further, the Englewood Board urges that the New Brunswick data should not be brushed aside as unsupportive of the secondary loss argument, pointing out that the ALJ found the circumstances in the instant matter distinguishable essentially because of its affluence. As to this, it avers that its affluence is precisely why white flight might occur. If white flight occurred in a district with relatively low socioeconomic levels, it will surely happen in this case where parents can afford to send their children to private or parochial schools if severance is granted. It believes that the New Brunswick experience confirms the testimony of Jacobs, Fleischer, Segall, Evans, Leverett and Fine and strongly contends that a substantial loss of its own white and Asian students would follow the loss of Cliffs students if severance were granted.

The Englewood Board also argues that the Cliffs Board's enrollment numbers are not right and that it is playing games with the cohort numbers. It urges that the substantiality of negative racial composition must be evaluated in the context of a school already precariously short of white and Asian students and that, even with the Cliffs students graduating, this does not mean that the 1988-89 cohort will be only 8. It likewise argues that severance should not be based on figures artificially depressed by litigation and the Cliffs Board's campaign for effectuating a withdrawal from DMHS but should be decided on the reasonable probability of rebound if severance were denied.

As to impact on educational quality, the Englewood Board strongly supports the ALJ's finding that severance would have a substantial negative impact and excepts to that determination only insofar as it believes that the negative impact will be even greater than Judge Springer found. Much of its arguments supportive of this contention reiterates the secondary loss position that declining enrollment would be exacerbated by the loss of its own white and Asian students. It also decries what it calls a "vicious and

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unjust" attack on Dr. Fine's study by the Cliffs Board which, it states, is the same attack launched before the ALJ through lengthy cross-examination and briefs which the ALJ rejected, judging her testimony as credible. Moreover, the Board avers that Mr. Segall's testimony is not contrary to the ALJ's decision on the loss of high-achieving students and points out that in the response referred to by the Board (5/11T105), Mr. Segall said that insofar as "raw numbers" of Cliffs students withdrawing was concerned, there would be no impact on the number of students at DMHS who are achievement-oriented. According to the Board, however, this does not detract from the fact that Cliffs students are disproportionately upper income and high-achieving students who serve in important peer leadership roles. (High rates of extracurricular participation and enrollment in honors and advanced placement courses) (Initial Decision, ante; 5/1T32-33; R-7, at p. 10)

The Englewood Board rebuts the Cliffs Board's assertion that the ALJ did not address traditional, concrete indicia of educational quality by contending that "the stigma of inferiority associated with school systems," (Initial Decision, ante), has been a "traditional" indicium of educational quality at least since Brown, supra, and that such indicium was traditional and concrete enough to support the landmark U.S. Supreme Court ruling that "[s]eparate educational facilities are inherently unequal." The Cliffs Board, on the other hand, argues that DMHS is not segregated but, as frequently pointed out by the Englewood Board and its experts, it is ethnically and racially diverse.

In addition, the Englewood Board argues that the loss of high-achieving students (Initial Decision, ante), has also been a traditional and concrete indicium of educational quality -- at least since Jenkins, supra, when our Supreme Court confirmed the power to order regionalization of school districts to prevent negative impact that included

> ***withdrawal of a significant number of educationally highly-motivated, capable students, [which was] likely to have an adverse effect upon the performance and motivation of the remaining Town students. (58 N.J. at 490)

The following passage serves well to summarize the Englewood Board's rebuttal of the Cliffs Board's assertions with respect to impact on educational quality:

> That the loss of Cliffs students would "deprive DMHS of a disproportionately large number of high-achieving students," I.D. 70, is directly supported by Judge Springer's finding, not excepted to by the Cliffs Board, that "the Cliffs contingent represents a disproportionately large number of upper income and high-achieving students who help to motivate and set an example for economically deprived and lower-achieving

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students." I.D. 44. See also R-171 (Cliffs students constitute a disproportionately high percentage of the pool of students taking advanced placement courses at DMHS); 5/21T78-18 to 80-17 (Segall) and R-178 (Cliffs students fill formal and informal leadership roles). That such a loss impacts negatively on the quality of education for the remaining students was recognized by our Supreme Court in Jenkins, 58 N.J. at 490, and is supported by the testimony of Mr. Segall, 5/21T61-6 to 63-10, and Dr. Fleischer. 8/5T123-19 to 124-7. See page 3, n.5, supra, as to the erroneous argument that DMHS can attract more white Englewood students by raising its educational standards.
(Englewood Board's Reply Exceptions, at pp. 16-17)

Moreover, Englewood states that:

***although boards of education can reallocate resources to preserve particular courses, the ability of a public school board to maintain a full program in times of declining enrollments is not limitless. 7/28T192-21 to 193-19 and 7/29T118-22 to 119-12, 124-7 to 126-18 (Evans) (that is a "utopian situation");[20] cf. I.D. 38 (threats to program from declining enrollments is the major reason why Tenafly has been accepting private tuition students). Although the Englewood Board cannot predict which specific courses would be eliminated after severance and its impacts, cf. I.D. 43, it can predict that the loss of high-achieving, college bound Cliffs students, I.D. 44, would lead to losses of some college preparatory honors and AP courses. 7/28T192-4 to 193-19 (Evans); 5/11T25-5 to 26-7 (Segall); cf. I.D. 38 (declining enrollment hits hardest small classes such as A.P. classes).

Cliffs students constituted a disproportionate 32.8% of all students taking A.P. courses at DMHS in 1984-85, and approximately 22% of such students in each of the two succeeding years. R-171. Even Dr. Gallia, the Cliffs Board's impact witness, testified that withdrawal of

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20 As Judge Springer concluded, Englewood already provides "strong financial support" for its schools, spending more per pupil than does Tenafly. I.D. 44.

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Cliffs students from DMHS would have had impacts as follows: substantial impact on A.P. Chemistry in 1985-86 (2 out of 6 enrollees were Cliffs students) (3/23T56-3 to 56-8); substantial impact on A.P. Spanish Literature in 1986-87 (3 out of 6 enrollees were Cliffs students) (3/23T69-9 to 70-5); and some impact on A.P. Biology in 1985-86 (10 of 30 enrollees were Cliffs students) (3/19T141-12 to 141-16). Mr. Segall, Dwight Morrow's Principal, testified that, if all Cliffs students had been withdrawn from DMHS before this current school year (1987-88), DMHS would have lost one A.P. course and a rigorous honors physics course, and all other A.P. courses would have been singletons, creating scheduling problems for students. 5/20T171-13 to 171-19.[21] Significant shrinkage of the pool of students available to fill A.P. and honors courses, leading to a loss of some courses, would be a real and definite, not speculative, impact of severance.[22] Secondary loss of Englewood college-bound students would exacerbate the negative impact.***" (Englewood Board's Primary Exceptions, at pp. 31-34)

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21 Dr. Smoley's impact analysis should be rejected as fundamentally flawed, because he assumed "that the Cliffs students are evenly distributed among courses and sections at DMHS," I.D. 40. As the numbers above demonstrate, Cliffs students are not so distributed. They are heavily concentrated in college-preparatory, A.P. and honors courses. See I.D. 39, 44.

22 It may be "speculative to hazard any guess as to which specific courses might be affected" by severance, I.D. 43; emphasis added; but it is not speculative to say that there will be a substantial impact on the DMHS program. See Rib 59-62.

C. COMMISSIONER'S DECISION

Upon an extensive and exhaustive review of the record in this matter, the Commissioner is in full agreement with the ALJ's recommendation to deny severance of the sending-receiving relationship between Englewood Cliffs Board and the City of Englewood Board. He finds the ALJ's analysis of the facts, issues and voluminous evidence and testimony exceptionally well-developed and well-reasoned; his legal analysis thorough and cogent; and his

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findings and conclusions amply supported by the record as discussed below.

Having thoroughly reviewed the Englewood Cliffs Board's position in this matter, the Commissioner rejects its argument that the State's policy against racial segregation is not implicated in this matter. While the Englewood Cliffs Board has put forth a series of educational reasons for wishing to sever its sending-receiving relationship with the Englewood Board, it is naive to suggest that racial considerations are not implicated given the demonstrable "white flight" from DMHS that has occurred since the late 1970's, particularly in light of its own expert's comments that the Englewood Board has long since exceeded the tipping point of 20-30% black enrollment which is believed to be the catalyst for white departure from a school (Dr. London 10/1 T 88-89, 106). However, what is key in this matter is that even when positive educational benefits may accrue from granting withdrawal in a sending-receiving relationship, those benefits can be outweighed by serious and compelling reasons such as racial imbalance for that issue is of utmost importance to the State. Branchburg, supra

It is clearly established in law that the Commissioner has a heavy responsibility to vigorously and aggressively combat threats to racial balance in our schools. The message of the New Jersey Supreme Court is quite evident in Booker, supra, that the Commissioner must not be misled by unduly restrictive views as to the scope of his own functions in reviewing and supervising local board of education actions and as to his own responsibility in the correction of substantial racial imbalance which may be educationally harmful even though a school has not reached the point of being all or nearly all black (at 181). That he has responsibility to combat "flight" from a racially imbalanced school is likewise clear in that decision when the Supreme Court states that "trends towards withdrawal from the school community by members of the majority must be viewed and combatted" (at 180). It is likewise clear from the Booker decision, that even when segregation is not de jure but de facto, action must be taken to safeguard New Jersey's strong State policy against segregation/imbalance in the public schools. That DMHS has a serious racial imbalance problem is obvious from the record with white enrollment being barely 12% in 1987-88. Thus, any local board action jeopardizing a racial balance which is already precarious must be scrupulously examined by the Commissioner in order that the State's interests are appropriately guarded.

Having carefully examined the record on the issue of racial balance, the Commissioner fully concurs with the ALJ's finding and determination that severance of the sending-receiving relationship between the Englewood Cliffs Board and the City of Englewood Board would have a significant negative impact on racial balance notwithstanding the small number of white students from Cliffs in attendance due to the unfortunate trend of the Cliffs parents to withdraw their children from the Cliffs resident enrollment to avoid

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placement at DMHS. As small as that number of students is, their withdrawal would in fact have a substantial negative impact for although the loss of 15 white Cliffs students would lessen the overall white percentage of students from 11.8 to 10.6%, that loss would reduce the number of white students by 16% (15/94) presently at DMHS and in 1990-1991 the percentage decrease would be approximately 25%. (Initial Decision, ante) This determination is in no way deemed contrary to the Morris School District v. Harding decision for in that decision the change in racial composition was found not to be significant because it increased by less than 1% the black enrollment of 16%. This slight increase was deemed acceptable under the circumstances because the Commissioner therein determined that:

> The total withdrawal of Harding Township pupils from Morristown High School would increase the proportion of black pupils enrolled in Morristown High School by less than one percent. While in no way disregarding the psychological importance of such an increase, the Commissioner concludes that such an increase is not sufficient to cause a disproportionate change in the racial composition of Morristown High School. This is particularly so in view of the anticipated population growth in predominately white Morris Township with its far greater geographic area available for further development. This growth may be reasonably expected to decrease the percentage of black pupils enrolled in Morristown High School in future years, regardless of the decision herein. (emphasis supplied) (1974 S.L.D. at 485)

As can be seen, the circumstances in the instant matter are dramatically different in that serious racial imbalance already exists with 88% of the DMHS enrollment being minority students. Moreover, no anticipated growth in the number of white students is projected within the confines of the City of Englewood as was anticipated in Morris Township to offset the impact on racial composition.

As to the Cliffs Board's argument that the ALJ did not carry his analysis far enough in that after graduation in June 1988 only 3 white students from Cliffs will remain at DMHS, the Commissioner is in agreement with the Englewood Board that the Cliffs Board is playing a numbers game. The figure it advances is grossly misleading and subject to misinterpretation. Assessing impact on racial composition is not measured simply by subtracting the current seniors and then basing one's conclusions on the Cliffs students remaining. There is a need to look at projected enrollments for a period of years to come just as was done by the ALJ who as it happens accepted projected enrollment figures of the Cliffs expert witness, Dr. Tomei, over the vigorous objections of the Englewood Board which sought to use Dr. Jacobs' seven year cohort survival projections rather than Tomei's figures which were based on only three years of enrollment.

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Upon careful examination of the arguments, the Commissioner agrees with the ALJ's use of the enrollment projections presented by Dr. Tomei. Given the circumstances of this matter, projected enrollment figures based on three years of enrollment in the immediate past with its clearly established pattern of non-enrollment of Cliffs students are determined to be a more realistic and accurate assessment of enrollment in the immediate future at DMHS than Dr. Jacobs' figures based on cohort survival ratios which are derived from seven years of data and which are dependent upon secondary loss projections and expectations of rebounding. The ALJ's reliance on enrollment figures based on the survival method is deemed appropriate in assessing impact of enrollment because it is a statistical technique widely accepted as a means to project future enrollments which rely on strict quantitative data. Further, acceptance of the enrollment figures offered by the ALJ, which comport more closely to the requirements for assessing severance impact in withdrawals from regionalized districts, N.J.A.C. 6:3-3.1, is deemed appropriate when faced with conflicting enrollment projections.

Accordingly, the findings and conclusions of the ALJ with respect to significant negative impact on racial composition having been demonstrated are adopted.

Given the arguments presented in this matter and another recent withdrawal application, Absecon Bd. of Ed. v. Pleasantville Bd. of Ed., decided June 1, 1988, the Commissioner is at this juncture compelled to put to rest once and for all the belief that because painfully few white students remain in a school due to a pattern of withdrawal by members of the majority of the school community (Booker, supra), there can be no significant negative impact on racial composition. Thus, not just the few remaining will be considered but the pool of eligible students as well who have withdrawn for whatever reason be it to private school, parochial school or, in this particular case, to a public high school in another community as well. If the State were to limit its consideration to 3 students as the Cliffs Board would have us do, it would be for all intents and purposes rewarding, not combating the withdrawal that has occurred. Booker, supra If such were to be allowed, the sending district would merely have to wait until enrollment is so devastatingly low that it could then argue that because so few students attend the receiving district, withdrawal can't possibly make a difference. This cannot be permitted.

In 1978-79 approximately 60% of Englewood Cliffs' students attended DMHS. In the intervening years obvious and dramatic decline in enrollment of Cliffs students at that school has occurred for reasons which, given the circumstances of this matter, must be attributed in large part to what is known in the field to be "white flight." For the Commissioner at this juncture to grant severance to the Englewood-Englewood Cliffs sending-receiving relationship as a matter of public policy would place an imprimatur of acceptance by the State to this flight.

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As to impact on educational quality, there can be no contradiction to the ALJ's conclusion that substantial negative impact will result from the withdrawal of even so few Cliffs students as remain at DMHS. One need look no further than the United States Supreme Court decision in Brown v. Topeka, supra, to support the ALJ's reliance upon evidence dealing not only with "material loss", i.e., reduction in course offering, effect on curriculum, loss of teaching staff, but also an assessment of impact on the psychosocial dimension of education referred to in this case as "symbolic loss." Notwithstanding the fact that DMHS is not all minority, it is, as previously stated, substantially imbalanced racially; thus, the following passage from the U.S. Supreme Court in Brown has no less bearing in this matter than if DMHS were all minority. It states:

> Segregation *** in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system. (at 494)

As noted by our own Supreme Court in Booker, supra, the fact that a school is not segregated by official policy does not preclude state action to eliminate de facto segregation, nor does a school have to be 100% or nearly all minority before acting as may be seen by the following passages:

> Whether or not the federal constitution compels action to eliminate or reduce de facto segregation in the public schools, it does not preclude such action by state school authorities in furtherance of state law and state educational policies. See Morean v. Bd. of Ed. Town of Montclair, 42 N.J. 237, 242-244 (1964); Addabbo v. Donovan, supra, 256 N.Y.S. 2d, at pp. 182-184; cf. Schults v. Bd. of Ed. of Township of Teaneck, 86 N.J. Super. 29 (App. Div. 1964), aff'd 45 N.J. 2 (1965). In a society such as ours, it is not enough that the 3R'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

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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 discriminations 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. It is heartening to note that, without awaiting further Supreme Court pronouncements, some states, including our own, have taken significant legislative or administrative steps towards the elimination or reduction of de facto segregation.*** (at 170-171)

In one additional respect the Commissioner, along with the State Board in sustaining his pertinent determinations, has taken a position which we deem too restrictive. While he has broadly recognized and acted on the principle that de facto segregation has an undesirable effect upon attitudes related to successful learning and denies equal educational opportunities to the racial minority, he has narrowly confined relief to situations where the schools in question were entirely or almost entirely Negro. This may be contrasted with Vetere where the Commissioner ordered the desegregation of a school with 75 per cent Negro pupil population, with Barksdale where the court ordered the desegregation of schools with Negro pupil populations appreciably more than 50 per cent but less in substantially varying amounts than 90 per cent, and with the

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* As correctly noted by the ALJ: New Jersey regulations incorporate the undisputed benefits of diversity as one of the state educational goals of a thorough and efficient education. N.J.A.C. 6:8-2.1(b)6 declares that, among other goals, the public schools shall help every student in the State "[t]o acquire the understanding of and the ability to form responsible relations with a wide range of other people including, but not limited to, those with social and cultural characteristics different from his or her own."

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> general tenor of our own opinion in Morean v. Bd. of Ed. of Montclair, supra. In Morean we first noted than an official policy of segregation would not be consistent either with sound legal principles or sound educational policies and then pointed to the fact that racial imbalance, though fortuitous in origin, presents much the same disadvantages as are presented by segregated schools. 42 N.J., at pp. 242-243. While we there made no attempt to define the precise extent of racial imbalance which would require remedial action, we did refer approvingly to Jackson v. Pasadena City School District, supra, where the court, after indicating that substantial racial imbalance would call for relief, cautioned that exact apportionment of Negroes among the schools was not required and that consideration must be given to all relevant factors "including the practical necessities of governmental operation." 382 P. 2d, at p. 882 (at 178-79)
>
> ***Before us, the petitioners have not advanced any fixed percentage but have presented the thought that, at some ascertainable point, the Negro population of a school becomes so excessively high, in contrast to the percentage of Negroes in the schools of the same level in the community, that it becomes known as a Negro school with the attendant "sense of stigma and resulting feeling of inferiority" referred to in Fisher v. Board of Education of the City of Orange, supra. That point generally may be well above 50 per cent but well below the Commissioner's and State Board's 100 per cent or nearly 100 per cent, as evidenced by the racially imbalanced schools stricken in Vetere and Barksdale. (at 179-180)

Thus, the Commissioner is in full support of the ALJ's conclusion that even with accepting the lower projected enrollment figures of Dr. Tomei and therefore less dire predictions of "material loss" than those advanced by experts accepting Dr. Jacobs' projections and secondary loss position, it is

> painfully evident that DMHS would suffer substantial negative impact on educational quality if withdrawal were allowed. As more fully developed in the factual findings (Section III, Part D, Subsection 2), withdrawal would have an unacceptable demoralizing influence on the children remaining at DMHS, would be widely perceived as unequal educational treatment on the basis of race, and would wrongfully deprive DMHS

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> of a disproportionately large number of high-achieving students essential to maintenance of academic excellence. See Brown v. Board of Education, 347 U.S. 483, 494 (1954) (invalidating the doctrine of "separate but equal" schools because that policy "is usually intepreted (sic) as denoting the inferiority of the [N]egro group" and because "[a] sense of inferiority affects the motivation of a child to learn.")
>
> These losses are concrete, and demonstrable rather than speculative. They are detectable by reputable academic studies, such as the qualitative research performed by Dr. Fine, and are verifiable by the informed opinion of experienced school administrators, like Dr. Fleischer and Mr. Segall. Moreover, they are "definite," in the dictionary sense that they are "marked by the absence of the ambiguous, obscure, doubtful or tentative." Webster's Unabridged New International Dictionary, 592 (3rd ed. 1976). Similarly, they are "tangible," in the sense that they are "able to be perceived as materially existent" and are "substantially real." Webster's at 2337. (But see also, Brown, 347 U.S. at 493, holding that even "intangible" losses are relevant and must be considered when determining the adverse effects of segregation in the public schools.) Without more, these losses in themselves are enough to justify denial of the Cliffs Board's application. (I.D., ante)

As to the Cliffs Board's arguments criticizing Dr. Fine's study, the Commissioner is unpersuaded that the ALJ erred in relying on her study as evidence supportive of the impact on the psychological and social domains of education at DMHS that state sanctioned withdrawal is likely to precipitate. As correctly argued by the Englewood Board, the criticisms levied against her study were dealt with during her testimony and the ALJ, fully cognizant of these criticisms both during hearing and by way of post-hearing briefs, accepted her testimony as credible and her study as excellent. Having reviewed the record on this issue, the Commissioner agrees.

That Dr. Fine's study was deemed supportive of negative symbolic loss, that is, the stigma, inferiority, and the demoralizing impact withdrawal may provoke, and Dr. Jacob's secondary loss position was not, serves as no basis for rejecting the ALJ's conclusion. Secondary loss refers to an even greater loss in enrollment at DMHS by the departure or flight of Englewood Board's own black and Hispanic students if severance is granted, given the message such severance would signal as so vividly revealed in Dr. Fine's study. Thus, enrollment projections are not based solely on the quantitative statistical analysis of cohort survival

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ratios. Rather, they extend beyond the analysis of strictly quantitative data by predicting further or secondary losses based on the psychosocial impact (symbolic losses) severance is likely to have. That the ALJ rejected psychosocial arguments in the area of numerical or quantitative projections as speculative and impressionistic but accepted them when assessing impact on the quality of education which includes both psychological and social dimensions is deemed to be neither erroneous nor contradictory. In that instance, recognition is given to the impact on students insofar as such things as their feelings, beliefs, perceptions, motivation and social relations are concerned but without extending beyond that to say, "Therefore, X number or percentage of Englewood students at DMHS will be likely to leave that high school."

While some secondary loss would undoubtedly result from severance in this matter (I.D., ante), the degree to which that loss would occur and the subsequent impact it would have on educational programming and staffing simply cannot be quantified with a strong degree of confidence as it is primarily impressionistic in nature, as found by the ALJ. The Commissioner does believe, however, that the dramatic decrease in white enrollments New Brunswick has experienced could reflect a worst scenario picture in this case because, as noted by the ALJ, the flight from that district occurred notwithstanding relatively low socioeconomic status of the community. However, the Commissioner agrees that, for the purposes of this inquiry, reliance on secondary loss projections and the likelihood of a New Brunswick experience is too speculative and, therefore, inappropriate.

Accordingly, the Commissioner adopts the findings and conclusions of the Administrative Law Judge as cited above, as well as the findings repeated below which so cogently and succinctly capture the essence of the negative impact under review:

> I FIND that severance would have a substantial negative impact on the quality of education at DMHS, much greater than any material loss caused by the withdrawal of 21 Cliffs students. In effect, any material losses would be greatly magnified by symbolic losses.
>
> Departure of 21 students, in and of itself, would not seriously impair the educational program at DMHS. Reasonable minds may differ as to what size is "ideal" for a high school, but even a small school of under 800 students is capable of sustaining a quality educational program. Since the Englewood Board possesses the prerogative of reallocating resources to preserve particular courses or to implement other educational priorities, it is speculative to hazard any guess as to which specific courses might be affected by the withdrawal of 21 Cliffs students.

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> However, Dr. Fine's excellent study substantiates that "any material losses pale by comparison with the symbolic losses" which DMHS would suffer if severance were approved. As that comment implies, the sticking point here is not so much the actual loss of a few students, but what that loss would signify. Those left behind at DMHS would perceive the result as an implicit message that the school is not good enough for whites and Asians, but is acceptable for blacks and Hispanics. Feelings of isolation and inferiority engendered by such perceptions would lower the self-confidence of minority youngsters and be detrimental to their trust in the basic fairness of the educational system. Speaking as a trained psychological observer, Dr. Fine stated that the reaction of black students to this litigation goes beyond mere "disappointment." Black students to whom she spoke uniformly viewed the situation as "betrayal" by the one public institution to which they belonged. Reemergence of the stigma of inferiority associated with segregated school systems would be a regressive development for public education in New Jersey and would have serious repercussions far beyond the immediate parties to this case. Policymakers at the state level must give careful consideration to the negative implications severance would have for future race relations and social cohesiveness, not only at DMHS but also in other schools throughout this state.
>
> To make matters worse, the Cliffs students are not evenly distributed among all socioeconomic groups and ability levels at DMHS. Rather, as Mr. Segall confirmed, the Cliffs contingent represents a disproportionately large number of upper income and high-achieving students who help to motivate and set an example for economically deprived and lower-achieving students. Loss of these particular students, therefore, would have a much greater negative impact on educational quality than their number alone would suggest.
> (I.D., ante)

Thus, having conducted an exhaustive review of the record, the Commissioner adopts the recommended decision of the ALJ for the reasons expressed in the initial decision and those stated herein. Any argument advanced by the Cliffs Board that the ALJ's conclusions of law are flawed because he improperly applied the applicable law is rejected. Moreover, the Commissioner rejects the Cliffs Board's arguments that attempt to justify severance because DMHS was an inferior educational facility at the time the petition was filed and should not, therefore, be held harmless from that. It is clear from

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the record that this case has been heavily immersed in an effort to cast DMHS as an inferior school, not worthy of its students. It is equally clear that the record does not support this position.

While it is clear that DMHS has experienced leadership problems and other problems which have been targeted for improvement, this does not serve to demonstrate that DMHS was at that time inferior. Rather, the record demonstrates that the Englewood Board has sought to identify weaknesses and to take corrective action to improve its programming for a wide diversity of student needs not found in the Tenafly Board's more economically and socially homogeneous student population. That its programs and goals differ from Tenafly's is not a sign of inferiority or inability to provide a more than adequate program for its college-bound student population which is obviously a concern of the Englewood Cliffs Board.

More specifically, the Commissioner finds as misleading the manner in which the Englewood Cliffs Board casts Mrs. Marsan's testimony in this matter by focusing on one aspect of her forthright testimony and omitting the overall sum and substance of it. A reading of that testimony clearly reveals the pride this parent and former Board President has in, and her commitment to, the quality of education being provided at DMHS which the record demonstrates provides a breadth and scope of programming highly conducive to successful college preparation.

The citing of the Englewood Board's purported "self-confession" in its grant application (P-236) is likewise deemed meritless in building a case of inferiority against DMHS. In the Commissioner's judgment, the record in this matter reveals Englewood to be a district that has been subject to an incredible amount of scrutiny and pressure, both external and internal to the district, over the last several years which few districts in this state have experienced or ever will experience. Moreover, it reveals a district that has taken steps to safeguard the quality of education which should be commended, not maligned.

Given the disposition of this decision denying severance, it is absolutely essential that there be a cooperative effort and true commitment on the Englewood Board's and the Englewood Cliffs Board's part to work together in the best interests of the students for whom they have the responsibility to educate.

II. TENAFLY BOARD'S TUITION POLICY AND INJUNCTION

The Tenafly Board maintains that while it agrees with a number of facts found by the ALJ as they pertain to its policy, it disagrees with others and believes certain others were omitted. It contends the ALJ's legal analysis and application of facts to law are erroneous and that a proper analysis compels a contrary result to his determination with respect to the injunction he issued. It

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also believes that the ALJ erred in saying that any consideration of what actions may be taken by Englewood and Cliffs parents with regard to their children's education in the event of injunction was irrelevant. On the contrary, it argues that such actions are relevant because they impact not only on the effect of the tuition policy on both the Englewood Board and the Cliffs Board, but also on the equitable considerations which must be weighed by the Commissioner in determining whether injunctive relief is appropriate and assessing the impact on the continued vitality of public education in New Jersey and the growing trend toward fostering educational excellence through greater parental involvement and choice.

More specifically, the Tenafly Board urges that the ALJ's determination that its tuition policy is illegal and contrary to public policy is clearly erroneous, factually unsupported and amounts to administrative overruling of duly enacted legislation. It finds the ALJ's condemnation of the policy as repugnant to be astounding in light of N.J.S.A. 18A:38-3 enabling districts to do exactly what the Tenafly Board is doing. This is true particularly in light of his express factual findings concerning the manner in which the policy was enacted, its express purpose and the educational market for which it was designed, i.e., students enrolling in private sector, and the fact that it was nondiscriminatory in its administration.

Moreover, the Tenafly Board argues that the initial decision is devoid of any factual findings that the injunctive relief recommended by the ALJ would result in increased attendance at DMHS, averring that an injunction will only result in diverting Cliffs students whose parents are dissatisfied with the quality of education at DMHS to the waiting seats of private and parochial schools. It puts forth 16 factual findings it believes mitigate against granting injunctive relief and which demonstrate the error of finding its policy illegal which are incorporated herein by reference and which it believes present a clear picture that:

> The picture presented by these facts is clear -- Tenafly properly adopted its tuition policy, for a valid purpose, to address legitimate needs of the district. It did not act with any improper motive, did not target children of any particular school district, and in fact targeted children who were otherwise inclined to attend area private and/or parochial schools. The policy has not been administered in a discriminatory manner, as a number of minority students have been admitted to Tenafly's schools as tuition students.***Nowhere in the record are there any facts or evidence which would support a finding that anything that was done by Tenafly with respect to its tuition policy was contrary to law. (emphasis in text) (Tenafly Board's Primary Exceptions, at pp. 6-7)

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As to erroneous factual findings, the Tenafly Board excepts to its policy being found "unusual" and "novel" (I.D., ante), averring that (1) it is not unlike those in neighboring communities and those introduced in evidence (CR-89; CR-86) and (2) the only thing unusual is that considerably more nonresidents attend Tenafly High School (THS) than other New Jersey public schools. (I.D., ante) It likewise excepts to the ALJ's commentary that typically the tuition policies have been designed to protect the continuity of education by accommodating students into or out of the district during the school year (I.D., ante), contending there is nothing in the record to support this generalization.

The Tenafly Board objects to the ALJ's opinion that the practical effect of its policy is to drain upper income white and Asian college-bound students from DMHS (I.D., ante) and to lure many of DMHS' most academically talented students (I.D., ante) because it is unsupported by the record, contrary to other factual findings made by the ALJ. It also argues that the evidence proves beyond a doubt that the policy does not attract any students who would have otherwise attended DMHS; rather, the Tenafly Board believes the policy keeps children who would otherwise be lost to the private sector.

The Tenafly Board reiterates that its policy can only be described as being in accordance with the law, pointing to the fact that the purposes of the terms and conditions for attendance are rational and beneficial to the district, the prospective students and public education in general. It strongly excepts to the ALJ's characterization that whites and Asians as a group are better able to afford the "entry fee" (I.D., ante), avowing that any notion charging tuition is illegal or improper must be rejected because there is not factual support for his broad generalization as to the financial capabilities of whites, Asians and Hispanics as a group and there is nothing pernicious about charging tuition since the nonresident students do not contribute otherwise to the Tenafly schools. This, among other things, leads the Tenafly Board to the conclusion that, based on the factual finding and the wording of the statute, there is no illegality in its policy and to rule otherwise is administrative overruling of the statute.

The Tenafly Board asserts that Shore Regional, supra, is not supportive of illegality as the underlying facts are distinguishable, namely the accepting of students from selected districts; the school was already overcrowded leaving the inference of ulterior/improper motive; the Tenafly Board's policy serves to increase its black and Hispanic enrollees not to circumvent integration; it does not accept students who would otherwise attend DMHS. Further, the Tenafly Board argues that the ALJ misconstrues the concept of the relationship between the public schools and the students which they are to serve vis-a-vis his reference that "92 tuition students at THS belong at DMHS." (I.D., ante, emphasis in Exceptions) Citing Pierce v. Society of Sisters, supra, and Meyer v. Nebraska, 262 U.S. 390 (1923), it avers that:

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> ...a child does not belong to any particular public school. A child has a right, pursuant to statute, to attend a public school in the district in which he or she resides free of charge, since the resident has already paid for the educational services through property tax dollars. But the school has no legal right to compel the attendance of that child at that school. Pierce, supra. The school exists to serve the child, not the other way around. If a parent chooses not to avail himself of this "free" education, the school cannot be heard to complain. It cannot be said that any child, whether attending DMHS, THS or any other school, belongs at DMHS. Thus, Judge Springer's admonition is based upon a false premise as to the propriety of any school district asserting what amounts to property rights in a child.
> (Tenafly Board's Exceptions, at p. 29)

In addition, the Tenafly Board maintains that any contention that its policy only provides choice for those who can afford tuition payments cannot serve as a proper reason to curtail choice. Rather "it should properly be an invitation to consider ways to extend choice to those who cannot now easily avail themselves of it." (Id.)

The Tenafly Board next turns to a lengthy legal argument that even in the context of de facto segregation, extraordinary relief such as enjoining a party from doing that which it is authorized by law to do cannot be granted, absent a showing of discriminatory purpose or intent. It likewise maintains that the ALJ's reliance on Norwood, supra, and again Shore Regional, supra, was misplaced because in both there was either overt or at least a reasonable suspicion of intent. The Tenafly Board itself supports the principles articulated in these two decisions, i.e., that the State cannot, and should not, support any institution which acts with discriminatory or segregatory intent or improper motive. In support thereof, it cites Washington v. Davis, 426 U.S. 229 (1976) which held that proof of racially discriminatory intent or purpose is required to show an equal protection violation, along with Village of Arlington Heights v. Metropolitan Housing Dev't Corp., 429 U.S. 252 (1977) and a series of education related cases in the vein of Milliken v. Bradley, 418 U.S. 717 (1974) which disallow remedial action against one district for de facto segregation in a neighboring district not intentionally caused by that neighboring district.

Lastly, the Tenafly Board urges that the ALJ failed to properly consider the appropriateness of the injunction, citing numerous instances where he failed to give proper weight to the evidence submitted regarding 10 points summarized below:

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1. An injunction is not necessary;

2. An injunction would fail and may well be counterproductive;

3. An injunction would cause Tenafly losses without any corresponding Englewood gains;

4. An injunction would cause Englewood Cliffs to lose a large number of Upper School students;

5. An injunction would destroy choice;

6. An injunction would penalize innocent parties;

7. An injunction and its aftermath would severely diminish the Governor's prestige and be a dangerous precedent;

8. An injunction would violate the rule that boards should not be enjoined when acting within their discretion;

9. An injunction would benefit only private and parochial schools, at the expense of public education;

10. An injunction would reward poor performance and penalize excellence.
(Tenafly Board's Exceptions, at pp. 41-49)

The Englewood Cliffs Board likewise urges reversal of the ALJ's injunction arguing the Tenafly Board's tuition policy has given an alternative to parents who are not sending their children to DMHS, particularly since not a single one at THS would otherwise attend DMHS. It, too, views the ALJ's words to be harsh given that the policy is similar to other public schools in New Jersey. Moreover, the Cliffs Board avers that while it may not be the State's concern whether or not its resident students not going to DMHS continue to avoid it, the enjoining order is flawed if the rationale for it is precisely because they would have otherwise attended that school.

Upon review of the record and weighing the exceptions and replies thereto, the Commissioner is in agreement with the Tenafly Board that the tuition policy itself is not in violation of law. Shore Regional, supra at p. 226 Rather, the effect it has created on the racial balance at DMHS is clearly contrary to public policy as determined by the ALJ and cannot be allowed to stand. Although the policy is, on its face, not discriminatory and although it was not adopted for improper motives, this does not mean that it should be allowed to stand insofar as the Cliffs and Englewood Boards are

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concerned, for the record has made it abundantly clear that the effect of the policy has been exactly what the ALJ denounces, namely, to exacerbate racial imbalance at DMHS by skimming off and luring students who are eligible to attend DMHS. Thus, in that sense it is "repugnant" and a "beggar-thy-neighbor" policy as it affects DMHS. Such a determination by the ALJ is by no means a misconception of the relationship between students and a public school district or Pierce, supra. Rather, it is entirely consistent with the Asbury Park v. Shore Regional decision which is applicable to the matter herein. That some distinguishing factual circumstances exist between the two is irrelevant because the effect of the two policies is the same, namely, negative impact on racial balance. Moreover, the ALJ is absolutely correct that the situation in the instant matter is far more serious than that found in Shore Regional because here we are talking of 92 students not 8. Citing the previously quoted passage from the New Jersey Supreme Court in Booker, supra, with respect to combating withdrawal of white students, the Commissioner determined on the basis of 8 students that:

> ***A trend has developed at the Shore Regional High School which must be thwarted if the determined directions of the Commissioner, the State Board of Education, the courts of this State and Nation are to be vigorously pursued. (emphasis supplied) (1971 S.L.D. at 226)

The Commissioner also spoke to the issue of the public high schools and the intent of N.J.S.A. 18A:38-3 in the following text:

> Public high schools in this State are created primarily for the purpose of serving the resident pupil population and those students from bona fide sending districts approved by the Commissioner and the State Board of Education. Certainly, the intent of N.J.S.A. 18A:38-3, supra, is not to provide an avenue permitting individual parents or local boards of education to circumvent the law requiring the integration of the public schools. (Id., at 227)

The above is true even if no purposeful intent on the part of the local board exists to circumvent integregation but where the effect is nonetheless to contribute substantially to racial imbalance in the affected high school. Moreover, the State Board in that decision addressed the primacy of the constitutional and statutorily based policies of this State designed to eliminate racial imbalance in public schools when local board actions under N.J.S.A. 18A:38-3 conflict with those policies. It reads:

> Shore Regional further argued that the principles enunciated in Booker v. Board of Education, Plainfield, 45 N.J. 161 (Sup. Ct. 1965), relied on by the Commissioner, were not sound bases for

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> determining that the discretion allowed a local board under N.J.S.A. 18A:38-3 must give way to the constitutionally and statutorily based policies of New Jersey designed to eliminate racial imbalance in public schools. Whatever may have been thought to be the limitations on the applicability of the principles of Booker in the face of statutes which might seem to suggest a conflict has been settled by the Supreme Court of New Jersey in the case of Jenkins v. Township of Morris School District, et al., N.J. (Sup. Ct., June 25, 1972) which defined the broad scope of the Commissioner's and the Board's authority in carrying out the educational goals and policies as expressed in our constitution and statutes. N.J.S.A. 18A:38-3 imposes no mandatory course of action on any local board. It allows discretionary action by such a board in certain situations if a board is so inclined to act. We see no conflict whatever between the principles of Booker and Jenkins as here involved and the provisions of the cited statute; and even if there were, the educational goals and objectives underlying Booker and Jenkins would have to be given primacy. (Id., at p. 229)

Finally, the Commissioner fully concurs with the ALJ that it is of no moment that Cliffs parents in this matter have no intentions of sending their children to DMHS. Under Pierce, supra, they are free to send their children to private or parochial school and that right is in no way infringed upon by this decision. There is no right, however, to use N.J.S.A. 18A:38-3 as a mechanism which directly and substantially contributes to racial imbalance at DMHS. A review of the affidavits of the parents does not reveal anything persuasive to compel modification of the ALJ's determination to enjoin any students not currently enrolled in Tenafly from so enrolling at THS. Unlike the students in Shore Regional, who were not allowed to continue at that high school, the enjoining in the instant matter does allow for the continued attendance of certain Englewood and Cliffs students in the Tenafly School District. There is, however, modification to the ALJ's injunctive order being made by the Commissioner as explained below.

The ALJ enjoined Tenafly from accepting any Englewood or Cliffs student in any of its schools on a tuition-paying or other basis. He did, however, allow any Englewood or Cliffs student already enrolled in the Tenafly School District to remain in that district through graduation.

This order is modified herein to enjoin Tenafly from accepting into Tenafly High School any Englewood or Cliffs student. Students from those districts attending THS on April 18, 1988 may continue there through graduation. The prohibition does not apply to grades lower than grade 9 as those grades are not involved in a

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sending-receiving relationship between the Cliffs and Englewood Boards nor is racial imbalance at that level at issue herein. However, Cliffs and Englewood students so enrolled now or in the future shall not be allowed to attend THS when they reach that level of schooling. One exception to this is granted, however, namely, any Cliffs or Englewood student enrolled in and attending eighth grade in Tenafly on April 18, 1988, the date of the initial decision in this matter, may attend THS in September 1988 until graduation therefrom. Englewood or Cliffs eighth graders attending school other than in the Tenafly School District on April 18, 1988 may not attend THS.

It is argued, inter alia, in a motion received with respect to Englewood Cliffs eighth grade students who have been accepted for attendance at THS this September that those students should be allowed to attend THS because they are "enrolled" there. Contrary to what is argued, those students were not enrolled at THS or any other Tenafly school at the time of the ALJ's decision. They were enrolled in and attending the schools where their eighth grade is located. To argue otherwise is meritless. Moreover, as was found by the State Board in Shore Regional, the affidavits filed by the parents and the arguments of the Cliffs and Tenafly Boards, there is no demonstration of "any impactive disadvantage or emotional or educational harm that would attach to attendance at the [designated receiving high school]." (at 230) Thus, the relief sought in the motion is denied.

While in no way diminishing either the right of a board of education to enact a tuition policy for attendance of non-resident students in its district under N.J.S.A. 18A:38-3 or the right of parents to send their children to schools under such a policy, it must be reemphasized that when there is a conflict between those rights and the constitutionally and statutorily based policies of this State on racial integration, the Commissioner's obligation is to combat racial imbalance. Thus, any rights of the Tenafly Board to have a tuition policy or Cliffs or Englewood parents to avail themselves of that policy must be held subordinate to the compelling State interest to combat racial imbalance. Shore Regional, supra

Accordingly, the findings and conclusions of the ALJ, except as modified herein, are adopted by the Commissioner.

III. DUAL SENDING-RECEIVING RELATIONSHIP

The Cliffs and Tenafly Boards are both in agreement that the best solution to the issues in the instant matter is to permit a dual sending-receiving relationship wherein Cliffs would have both THS and DMHS as its receiving high schools. Each district stresses that Cliffs parents would then have a choice to select the school best meeting the needs of their children and each argues that the ALJ should not dismiss the solution out of hand without consideration of any of the potential benefits.

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The Cliffs Board criticizes that the ALJ "unfortunately has confused a consideration relevant to any eventual State determination on interdistrict choice in public schools with the more narrow and immediate issue at hand: what school or schools should be the receiving high schools for Englewood Cliffs." (Cliffs Board's Primary Exceptions, at p. 27)

Because the Cliffs Board was found to have genuine educational reasons for termination and its request is in good faith, it argues that it is

> simply not relevant that Englewood parents would not have a choice of high school; most New Jersey school districts as Englewood, have only one public high school *** and, until the State implements freedom of choice across school district lines, there cannot be a free public high school choice for students in these districts. (Id., at p. 28)

The Cliffs Board sees no invidious distinction in this since Englewood parents have power to affect DMHS through their Board of Education, a power its parents do not enjoy.

The Cliffs Board also alleges that the ALJ did not weigh sufficiently the evidence as to a student's success in school depending on whether his or her parents "buy into the school's educational goals and missions." (Id.) It does concede, however, that in the short term, given the negative perceptions in the community, most parents will favor THS. It states with respect to this:

> ***[T]he Cliffs Board concedes that in the short term, given the negative perceptions in its community of DMHS--in many aspects now validated by the Initial Decision--most parental decisions will favor THS. However, now that educationally based reasons have been conclusively shown to have been generally the basis of parental choice in the Cliffs, it should be obvious that if DMHS is as excellent a school as Englewood contends or, more likely, if DMHS should continue on its self-proclaimed program of improvement, Cliffs parents will opt - for some, perhaps many, children - to return to DMHS. They did so in great numbers in the 1970's - particularly earlier in that decade before the deterioration proven at the hearing had taken hold. There is no evidence - aside from Englewood's paranoid assertions - that racial bias would prevent them from doing so again. (Id., at p. 31)

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The Englewood Board strenuously rejects the arguments advanced by the Cliffs and Tenafly Boards, agreeing with the ALJ that such an alternative would be unfair and discriminatory. (I.D., ante) It goes on to state that:

> ***[A] dual S/R relationship in the circumstances of this case would be identical in result to severance of the S/R relationship with DMHS and establishment of a new S/R relationship with THS. It would be a sham and the Cliffs Board knew it when the proposal was launched long after the Board filed its severance petition. Cliffs white and Asian parents, with their fears and misunderstandings of DMHS, see pages 6-12, supra, having been told by their own Board of Education for years that DMHS is a dreadful place while THS is a palace of learning, will not choose to attend predominantly minority DMHS over homogeneous white and Asian THS.
>
> The Cliffs Board's president confirmed the point. 1/21T37-9 to 38-18 and 202-3 to 202-13 (Geiger); cf. 10/1T133-5 to 136-6, 138-3 to 138-8 and 139-14 to 140-24 (London) (with two schools of equal quality, white parents, with some exceptions, will not voluntarily send their children to the predominantly minority school). Dr. Fleischer concurred. 8/5T125-15 to 127-18 (Cliffs parents would opt for THS and not DMHS, and the result would be equivalent to severance). Because Cliffs parents would not choose DMHS under a dual S/R relationship, that sham remedy would increase segregation at DMHS, contrary to law and constitutional policy. "Choice" should be rejected if it fosters segregation. See, e.g., 8/10T129-6 to 130-22 (Fleischer) (quoting from Time for Results, the Governors' 1991 Report on Education) (e.g., "...analysts must consider what [the] impact of choice programs will be on racial balance. Policy makers should limit choice among schools so that it does not have a negative impact on racial balance. Choice programs should seek to bring together rather than isolate students from different racial and economic groups.")
> (Englewood Board's Primary Exceptions, at pp. 56-57)

Upon careful consideration of the record and the parties' exceptions, the Commissioner is in full agreement with the ALJ's rejection of the dual sending-receiving alternative. Such a relief would certainly serve to legitimize what has been found to be impermissible in this case, namely, the flight of 76 Cliffs students to THS which has contributed to the serious racial imbalance at

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DMHS. The establishment of a dual sending-receiving relationship would in essence give legal/State sanction to such flight which must be combated not facilitated. Just as severance of a sending-receiving relationship will not be permitted if substantial negative impact results, neither shall a dual sending-receiving relationship be approved when substantial negative impact results. Allowing Cliffs parents to select between THS and DMHS would only serve to exacerbate an existing serious racial imbalance at DMHS and would impact on educational quality in the same manner as severance.

Further, the Cliffs Board is wrong in its assertion that the flight of Cliffs students has been exonerated because educational reasons for severance were found to have been advanced by the Cliffs Board. As previously stated, no one could seriously believe that racial prejudice and circumvention of integration is not at play in this case. Thus, the Commissioner again emphasizes that even if legitimate educational reasons are advanced for severance or the establishment of a dual sending-receiving relationship, neither will be granted where compelling reasons, such as substantial negative impact on racial composition and educational quality, as herein, outweigh the educational benefits sought by the sending district in a new relationship with another district. While finding that educational reasons existed for the Cliffs Board's request for severance in this matter, such acknowledgment does not detract from the ALJ's determination and the Commissioner's affirmance that DMHS provides a broad, comprehensive educational program which is both thorough and efficient and capable of providing more than adequate preparation for post-secondary education.

IV. REGIONALIZATION

The Englewood Board strenuously objects to the ALJ's failure to order regionalization and argues that at the very least a regionalization study should be ordered. It disagrees that the "single community" characteristic of the Jenkins, supra, case (Morristown-Morris Township) is "a sine qua non to application of the principle that district lines may be crossed to avoid segregation in fact" and urges that if that concept is instructive at all, its focus should be on educational ties between communities. (Englewood Board's Primary Exceptions, at p. 38) It then goes on to point out each of the ALJ's findings which support this contention, leading the Board to urge that the educational ties, when coupled with the "shared geography and history" (I.D., ante) of the communities, satisfy whatever "single community" characteristic is applicable to the matter herein.

The Englewood Board asserts that although the ALJ mentioned socioeconomic differences between the communities, he failed to note that these differences are analogous to the differences between Morristown and Morris Township in Jenkins; thus, the Board argues that the socioeconomic factors favor regionalization as they reflect the potential for diversification.

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The Englewood Board also excepts to the ALJ's cost benefit analysis of regionalization and contends that the substantial long-term benefits identified in pages 60-61 of the initial decision warrant regionalization or at least an order requiring a regionalization study, since that option should not be rejected without a full study. Further, the Board avers that, even on the record as it stands now, the advantages of regionalization far outweigh any disadvantages, urging that:

> ***the ALJ rejected regionalization for essentially three reasons:
>
> (1) because one cannot be sure that a regional school will be better than DMHS and THS, I.D. 62, sec. 1 and 65;
>
> (2) because the change to a regional school may meet with resistance and would require resources that could be better spent improving THS and DMHS, I.D. 65; and
>
> (3) because a diverse student body will present challenges to educators at a regional school. I.D. 62, secs. 3, 4.
>
> Rejection of regionalization for these reasons would be contrary to our state's public policy, and, in part, contrary to the evidence.
> (Englewood Board's Primary Exceptions, at p. 41)

The Englewood Board offers a rebuttal of each of these reasons as well as a series of six other points of rebuttal (Id., at pp. 41-47) to support its contention that the ALJ's determination on regionalization should be rejected or modified. The focus of the rebuttal centers on such issues as the State's policy on integration, the ability of the three districts to plan a high quality program which expands academic and cocurricular offerings, and the positive benefits of diversity.

Upon review of the record and careful weighing of the arguments put forth in the parties' exceptions and replies, the Commissioner is in agreement with the ALJ that compulsory regionalization should not be ordered in this matter. Forced regionalization is an extraordinary relief that will be ordered only when the factual circumstances demonstrate that (1) "a single community" exists between (or among) the districts in question; (2) regionalization is "entirely reasonable, feasible, and workable"; and (3) regionalization can be accomplished "without any practical upheavals." Jenkins, supra at 505 The Englewood Board has failed in these proofs and its arguments to the contrary are deemed meritless. Any purported "incompleteness" in the record rests solely with the Englewood Board as cross-petitioner seeking such relief.

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The ALJ's factual and legal findings are adopted by the Commissioner. Accordingly, the Englewood Board's motion seeking forced regionalization is dismissed. Further, the Commissioner sees no compelling basis to order a regionalization study. After 99 days of hearing, tens of thousands of pages of transcripts and hundreds upon hundreds of pieces of evidence resulting from the microscopic scrutiny the schools in this case have undergone, the Commissioner determines that any further study would be inappropriate because the record herein is more than sufficiently developed to support the ALJ's conclusion that regionalization is not warranted.

V. SUMMARY

Based on the significant negative impact on racial composition and educational quality that would result if the sending-receiving relationship between the Cliffs Board and the City of Englewood Board were allowed to be severed, the petition for termination filed by the Cliffs Board is hereby DENIED. Also DENIED is its request to establish a dual sending-receiving relationship with the Tenafly Board as this would likewise create significant negative impact on racial balance and educational quality.

It is further ordered that the Tenafly Board of Education cease and desist from admitting to its high school on a tuition or other basis any students who are residents of either Englewood or Englewood Cliffs. While the tuition policy on its face is not illegal, the effect under the circumstances of this matter is to exacerbate the precarious racial imbalance at DMHS; thus, the strong State policy against discrimination and segregation must have primacy over any discretionary power granted to a board by N.J.S.A. 18A:38-3. Shore Regional, supra The injunction does not apply to resident students from those districts who were enrolled in and attending either THS or eighth grade in the Tenafly School District on the date of the initial decision in this matter, April 18, 1988. Nor does it apply to any grade level other than that currently or in the future served by THS except that no Englewood or Englewood Cliffs resident student so attending Tenafly in a grade lower than those of its high school shall be allowed to attend THS when he/she reaches that level of schooling. This ruling fully disposes of the issues raised in the Cliffs Board's Motion for Interim Relief submitted on behalf of eighth grade students who were accepted for admission to Tenafly High School for the 1988-89 academic year.

Moreover, the Englewood Board's cross-petition for forced regionalization is DENIED for failure to demonstrate circumstances comparable to those in the State Supreme Court's decision in Jenkins, supra.

COMMISSIONER OF EDUCATION

July 11, 1988

Pending State Board

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BOARD OF EDUCATION OF THE BOROUGH OF ENGLEWOOD CLIFFS, BERGEN COUNTY,	:	
PETITIONER/CROSS-RESPONDENT,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	DECISION ON MOTION
RESPONDENT/CROSS-PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF TENAFLY, BERGEN COUNTY,	:	
CROSS-RESPONDENT.	:	
	:	

This matter is before the Commissioner by way of a Motion for a Partial Stay to his decision rendered on July 11, 1988. Petitioner seeks to enjoin that portion of the decision which prohibits the Tenafly Board of Education from allowing fourteen eighth grade students who reside in Englewood Cliffs to attend Tenafly High School (THS) as they were not in attendance in the Tenafly School District as of April 18, 1988, the date of the initial decision rendered in the matter. Said fourteen students had been accepted for attendance at that school but were attending eighth grade in Englewood Cliffs (13 students) or a private school (1 student) on April 18, 1988. The ALJ recommended enjoining the attendance of any Englewood Cliffs or Englewood student not enrolled in the Tenafly district as of that date.

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PETITIONER'S POSITION

I. IRREPARABLE HARM

Petitioner avers that a dispute exists as to whether the fourteen students were actually "enrolled" at THS and while not desiring to become involved in a semantic discussion as to the meaning of that word, it contends that the students fully believed and relied upon the fact that they would be attending THS in September 1988. As such, it avers the Commissioner altered the ALJ's directive.

Petitioner argues that irreparable harm would result if the students are not allowed to attend THS in that their parents made a determination that it was not in the best interest of their children to attend Dwight Morrow High School (DMHS) due to the increased quality of education they believe their children would receive at THS. The Board avers that a number of the students had withdrawn either acceptances or applications from private and parochial schools in order to attend THS once notified of their acceptance. Further, none of these parents would send their children to DMHS unless forced to do so. As to this, petitioner states that the parents have been scrambling to obtain other suitable educational alternatives for the 1988-89 school year. Even with this scrambling, it would appear that at least eleven will not attend DMHS.

Petitioner further argues that choice with regard to one's education is an important component in the value of education and that in view of the "pressure cooker nature of this litigation, the forced attendance of these students at [DMHS] may cause further

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problems with their education and their development." (Motion for Stay, at p. 7) Moreover, these students have formed a close friendship and were anxious to attend THS and, as a consequence of the Commissioner's decision, they have been forced to split up and go their separate ways, a factor which may further undermine their educational enthusiasm. It also points out that the first year of high school is crucial in integrating the student into the new educational environment and in developing peer relationships and friendships. Consequently, if the Commissioner's decision should be reversed on appeal, absent this stay, the students will have suffered irreparable harm in having failed to reap the benefits of the integration process into the school of their choice.

Further, the Board argues that any harm to the Englewood City Board is, at most, minimal as only three students plan to attend DMHS if the stay is denied. (See Affidavits.) Also, given the limited nature of the stay in both time and effect, petitioner argues that allowing the attendance of these fourteen students at THS will not have an effect upon other students of DMHS or create the "symbolic loss" alleged and argued by the Englewood Board before the ALJ nor have any effect on the racial composition at DMHS over time. Lastly, with respect to irreparable harm, petitioner contends that the particular narrow issue addressed in the stay

> could not reasonably be considered an issue of race but simply one of the lives of 14 children whose education and environment may be unnecessarily upset if such a stay were not granted. In light of this, the equities involved in this matter clearly favor the granting of a stay. In fact, the issuance of a stay by the Commissioner would demonstrate a desire to deal with this difficult matter in an even handed manner. (Id., at p. 10)

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II. MERITS OF APPEAL

Petitioner argues that if any of the elements of the case is reversed, namely, termination of the sending-receiving relationship between Englewood and Englewood Cliffs, a dual sending-receiving relationship, or the injunction imposed on the Tenafly Board with respect to non-resident students, the practical result is that all fourteen students would be allowed to attend THS. It then presents detailed arguments as to why there is a likelihood of reversal of the Commissioner's decision with respect to each element which will be presented to the State Board in its appeal, a brief summary of which appears below.

A. Injunction Against Tenafly

1. The Commissioner oversteps the bounds of his authority by issuing an injunction against the Tenafly Board's tuition policy while affirming the legality of that policy.

2. The decision flies in the face of federal constitutional decisions which find that even where de facto segregation exists, which has not been proven in the instant matter, extraordinary relief in the nature of an injunction is rare.

3. Restraining a party outside the segregated district from doing what it is otherwise permitted to do by law cannot be obtained without showing discriminatory intent of purpose.

4. Neither Jenkins et al. v. Twp. of Morris, 58 N.J. 483 (1971) nor Bd. of Ed. of Asbury Park v. Bds. of Ed. of Shore Regional High School District, Deal, and Interlaken, 1971 S.L.D. 221, aff'd State Board 228 lead to a contrary conclusion.

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5. As a basis for granting the injunction, the Commissioner indulged in gross speculation which cannot be countenanced by the State Board in establishing educational policy when agreeing with the ALJ that the situation in the instant matter was far more serious than in Shore Regional because 92 students are involved, not 8. This fails to take into account the evidence that the 92 students would likely not attend DMHS - they would choose to attend private schools in the same way as eleven of the fourteen herein have recently chosen.

6. There is a substantial Equal Protection argument that the injunction violates the Fourteenth Amendment equal protection rights of the Englewood Cliffs students and parents.

B. Severance of the Sending-Receiving (S-R) Relationship

1. There is significant foundation upon which the State Board may disagree with the Commissioner's decision to disallow severance and to rule out a dual S-R relationship given the recently articulated policy by the State Board in favor of sending district choice in Cranbury Bd. of Ed. v. Lawrence Bd. of Ed., State Board April 1, 1987, dis. N.J. Superior Court April 22, 1988.

2. Considering the statute applicable herein prescribes examination of all relevant circumstances to determine the outcome of a severance request, the Commissioner overemphasized the racial impact factor particularly in light of the minimal observable impact and he de-emphasized the other factors.

3. The Commissioner should not have indulged in speculation to find negative impact. Cranbury, supra

4. The speculative concept of "symbolic loss" which underlies the whole educational quality portion of the decision relies on the racial issue and

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sends a dangerous message to other school districts contemplating entering into a S-R relationship since the symbolic loss concept would apparently apply to any school in which racial minorities constituted a majority, or even a larger percentage, of the students.

5. The symbolic loss concept is so nebulous that it could be used to show negative impact whenever a S-R relationship was to be severed.

6. Cranbury, supra, indicates that a minor negative impact may be overridden by other positive aspects of severance.

C. Drawing the Line on the Tuition Policy Injunction

1. The Commissioner's decision restraining the fourteen students from attending Tenafly is arbitrary and capricious and is thus subject to attack upon appeal. As such, there would be no harm to the thrust of the Commissioner's decision, and no precedential value for the future, by including among those covered by the "grandfather clause" the fourteen students from Englewood Cliffs who had actually been accepted at THS on the date the initial decision was issued.

The Board of Education of the City of Englewood (Englewood Board) opposes petitioner's motion for a stay and it has submitted it own cross-motion to compel the production of previously disclosed and partially published minutes of a closed session of the Englewood Cliffs Board conducted on or about July 15, 1988. It also seeks dismissal of paragraph 3 of petitioner's July 25, 1988 Notice of Appeal to the State Board, averring that the Cliffs Board has no standing on the issue of the THS injunction.

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The Englewood Board avers that petitioner's motion for stay should be denied for failure to meet the standards upon which a stay is granted, namely, a demonstration of irreparable harm and a probability of success on the merits. It avers, inter alia, that the allegation that students will be irreparably harmed by attendance at DMHS should be struck down because high quality public education at DMHS remains available. It likewise avers the "new speculation" that students will be so harmed by attendance at selected private schools is outside the record and, as a matter of public policy, should not be considered by the Commissioner. Further, if a stay were granted, irreparable harm to the Englewood Board and DMHS would result as "it would give credence to the vicious, false assertion of the Englewood Cliffs Board that DMHS is an inferior school. It would exacerbate racial imbalance at DMHS." (Englewood Brief, at p. 10)

Moreover, the Englewood Board argues that the stay should be denied because petitioner lacks standing to seek it as indicated below.

> It is well-settled that a party must have an interest in an issue before it will be permitted to litigate it. In order to have standing, a party must have a sufficient stake in the outcome of the issue and a true adverseness. Thanasoulis v. Winston Towers 200 Association, Inc., 110 N.J. 650 (1988). It is fundamental "that no person can maintain an action respecting a subject matter, in respect to which he has no interest, right or duty, either personal or fiduciary." Baxter v. Baxter, 43 N.J. Eq. 82, 86 (Chan. 1887), aff'd, 44 N.J. Eq. 298 (E. & A. 1888) (mere intermeddlers lack standing).
>
> The Englewood Cliffs Board has no such interest in the subject matter of this motion. The

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> injunction which is sought to be stayed was issued against the Tenafly Board only. It contains no prohibitions addressed to the Englewood Cliffs Board and does not affect the Englewood Cliffs Board. That Board's sole interest and responsibility is to provide quality public education to residents of Englewood Cliffs. As a matter of law, its public high school is DMHS and its duty is to encourage attendance at its public schools, including DMHS. It has absolutely no authority to assist or encourage its residents to attend high schools other than DMHS; indeed, such activity is directly contrary to its mission. As to the injunction issue, it is a mere intermeddler, with no standing to litigate. See, e.g., County of Bergen v. Port of New York Authority, 32 N.J. 303 (1960) (county could not represent the general public interest in an area not within the orbit of its own political responsibility).
>
> Beyond the standing defect, the conduct of the Englewood Cliffs Board in bringing this stay application is ultra vires its statutory authority and a breach of its public duty. A school board is a public entity, not a shrill political action committee. Yet, this school board spends public funds to benefit private parties, paying lawyers to facilitate white flight from the legally designated district public high school. The illegality of this conduct is patent. See, e.g., Norwood v. Harrison, 413 U.S. 455, 466 (1973).
>
> (Id., at pp. 10-11)

The Englewood Board maintains that most of the facts relied upon here have already been considered and rejected by the Commissioner and that petitioner has failed to demonstrate any reason why a change should be ordered as the new affidavits/certifications submitted do not alter the Commissioner's prior conclusions. It argues that, if anything, the case for a stay is "worse" now than when the requested relief was previously denied, in that petitioner alleged that the students would be harmed because of being unable to find private school placements (see May 17, 1988

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letter brief of petitioner, at p. 7) whereas now thirteen of the fourteen students have secured placements for September, with the fourteenth not yet making up his/her mind.

Petitioner opposes the Englewood Board's cross-motion arguing that it does have standing to move for a stay in that it has an interest in the ability of students from within its district to attend public high school at THS as students from all other school districts are allowed to do, as well as the fact that it has been an interested party during the proceedings which resulted in the decisions rendered thus far by the ALJ and the Commissioner.

Petitioner argues, inter alia, that Englewood's motion should be dismissed on procedural grounds because it is addressed to the wrong tribunal, namely, to the Commissioner rather than to the State Board. It further contends that, at best, it is unseemly for Englewood to argue at this late date that the Commissioner's decision does not sufficiently affect Cliffs to allow it to litigate the THS injunction. Petitioner's arguments on the merits of the motion will not be summarized in view of the fact that the Commissioner agrees that dismissal is warranted on procedural grounds as explained below.

As to Englewood's motion to compel it to turn over minutes from a July 1988 closed Board session, petitioner urges that such request is "simply absurd" arguing, inter alia, that dismissal of the motion is warranted on procedural grounds because there is no basis post hearing for the Commissioner to order disclosure as the record before both him and the State Board is complete.

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COMMISSIONER'S DECISION ON MOTION

Upon review of the Englewood Cliffs Board's Motion for a Stay and the opposing arguments of the Englewood Board, it is determined that the stay request be denied for failure to meet the standards for injunctive relief set forth by the court in Crowe v. De Gioia, 90 N.J. 126 (1982) in that no irreparable harm has been demonstrated by petitioner; nor has there been a demonstration of likelihood of prevailing on the merits; nor in balancing the equities of the case is it demonstrated that the relative hardship to the fourteen students in question here outweighs that of the Englewood Board. A thorough and efficient educational program is available to each of these students at DMHS. That eleven out of fourteen students will be "forced" to attend private or parochial schools in September because of parental preference over placement at DMHS has no more bearing now than it did when addressed earlier by the Commissioner as part of his final decision in the matter in July 1988. The parents were put on notice as of April 18, 1988 that students who were not enrolled in Tenafly on that date were enjoined from attending THS in September 1988. That some may have chosen to consider acceptance for attendance as synonymous with or equivalent to enrollment is of no moment. The final decision of the Commissioner on July 15, 1988 made it abundantly clear that the fourteen students in question were not "enrolled" in Tenafly on April 18, 1988 but were in fact "enrolled" in the very schools they were attending on that date. Moreover, even if it were the ALJ's intention to allow attendance at THS for those who were accepted for

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enrollment in September 1988, such determination of the ALJ constitutes a recommendation to the Commissioner which he could accept, reject, or modify/alter. N.J.S.A. 52:14B-10(c)

As correctly noted by the Englewood Board, the arguments originally put forth by petitioner urged that injunctive relief was necessary because alternate placements could not be obtained in so short a period. This has obviously proven to be a needless concern in that all but three of the students in question will, according to petitioner, be attending schools other than DMHS. Moreover, the Commissioner is unpersuaded that irreparable harm would result because friendships have already been formed in anticipation of attending THS or because of the possibility of disruption of education if his decision is reversed or a stay granted on appeal. It is unquestioned that parents have a right to select alternate schooling in private and parochial schools and that right has not in any way been interfered with in this matter. There is a great need in this matter, however, to protect against the already precariously low numbers of white students attending DMHS. Thus, although there may be only three students at most who would attend DMHS, this will not deter the Commissioner from denying the stay.

As to the Board's cross-motion to dismiss certain paragraphs of petitioner's motion to appeal, no authority exists for the Commissioner to do this. Although there may be validity to the assertion that petitioner has no standing to argue on behalf of students desiring to leave its jurisdiction, the motion and relief sought would have to be directed to the State Board, not to the Commissioner. Further, the Commissioner cannot take any action on

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the transcript/minutes issue since the cause of action arose after his final decision was rendered. If the Englewood Board believes that the transcripts are essential to its pleadings on the merits of the appeal, relief with respect to that issue must likewise be addressed to the State Board directly.

Accordingly, petitioner's motion for stay is denied as is the Englewood Board's cross-motion.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

SEPTEMBER 1, 1988

DATE OF MAILING - SEPTEMBER 1, 1988

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BOARD OF EDUCATION OF THE BOROUGH OF ENGLEWOOD CLIFFS, BERGEN COUNTY,

PETITIONER/CROSS RESPONDENT-APPELLANT,

V.

BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,

RESPONDENT/CROSS PETITIONER-CROSS APPELLANT,

V.

BOARD OF EDUCATION OF THE BOROUGH OF TENAFLY, BERGEN COUNTY,

CROSS RESPONDENT-APPELLANT.

STATE BOARD OF EDUCATION

DECISION ON MOTION

Decided by the Commissioner of Education, May 11, 1988

Decision on motion by the Commissioner of Education, September 1, 1988

For the Petitioner/Cross Respondent-Appellant, Hellring, Lindeman, Goldstein, Siegal, Stern & Greenberg (Joel D. Siegal, Esq., of Counsel)

For the Respondent/Cross Petitioner-Cross Appellant, Clapp and Eisenberg (Arnold K. Mytelka, Esq., and Agnes I. Rymer, Esq., of Counsel) and Paul L. Tractenberg, Esq.

For the Cross Respondent-Appellant, Riker, Danzig, Hyland, and Perretti (James J. Rothschild, Esq. and Glenn D. Curving, Esq., of Counsel)

For the Intervenor, Smith, Don, Alampi & Scalo (Philip Scalo, Esq., of Counsel)

On April 18, 1988, an Administrative Law Judge ("ALJ") denied the petition of the Board of Education of the Borough of Englewood Cliffs ("Cliffs Board") requesting termination of its sending-receiving relationship with the Board of Education of the City of Englewood ("Englewood Board"). The ALJ also granted the Englewood Board's cross-petition for injunctive relief barring the Board of Education of the Borough of Tenafly ("Tenafly Board") from admitting any Englewood or Englewood Cliffs students to any of its

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schools on a tuition-paying or other basis, except that those students already enrolled in the Tenafly district were permitted to remain in the district through graduation. Initial Decision, at 79.

On July 11, 1988, the Commissioner of Education adopted the ALJ's findings and determinations, but modified the ALJ's recommendation on the Englewood Board's cross-petition for injunctive relief. He enjoined the Tenafly Board from accepting into Tenafly High School ("THS") any students from Englewood or Englewood Cliffs, except for those students already attending THS or enrolled in and attending eighth grade in the Tenafly district on April 18, 1988, the date of the ALJ's decision. Commissioner's Decision, at 123.

The Cliffs Board filed an appeal from the Commissioner's determination denying its petition to terminate its sending-receiving relationship with the Englewood Board and enjoining Englewood Cliffs students from attending THS. The Tenafly Board filed an appeal from the Commissioner's decision enjoining it from accepting to THS any students who were residents of Englewood or Englewood Cliffs, and the Englewood Board filed a cross-appeal from the Commissioner's decision denying its cross-petition for forced regionalization.

Allison Spiegel (hereinafter "Intervenor"), a student from Englewood Cliffs attending seventh grade in the Tenafly district on April 18, 1988, filed a motion to intervene in these proceedings, by her guardian ad litem, Rona Spiegel. The Intervenor argues that she has a substantial interest in the case and that the Commissioner's decision to permit eighth graders from Englewood and Englewood Cliffs who were attending school in the Tenafly system on April 18, 1988 to continue to THS while denying that right to seventh graders was arbitrary and without basis in law or logic. For the reasons and with the limitations expressed herein, we grant her motion.

In order to intervene in administrative proceedings, the interest of a proposed intervenor in the outcome of the case must be direct and substantial. In re White, 171 N.J. Super. 493, 498 (1979). See also N.J.A.C. 1:1-16.1, 1:1-16.3.

The Intervenor was a seventh grade student in the Tenafly district on April 18, 1988, the date of the ALJ's decision. Pursuant to the ALJ's recommended decision, she would have been permitted to continue on to THS. However, under the Commissioner's decision, which modified that recommendation, she will not be permitted to attend THS since she was only in the seventh grade in the Tenafly district on the date of the ALJ's determination. Thus, she will be directly affected by our ultimate decision in this matter.

In addition, we find that the Intervenor's interest is not adequately represented by the existing parties. See In re White, supra, at 499. It is the position of the Tenafly Board in its appeal from the Commissioner's grant of the Englewood Board's cross-petition for injunctive relief that it should not be enjoined from accepting Englewood and Englewood Cliffs students at THS.

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While the Intervenor's interest would certainly be protected if the Tenafly Board prevails on its appeal, in the event that the State Board affirms the Commissioner's grant of injunctive relief to the Englewood Board, the Tenafly Board does not challenge as arbitrary the modified cut-off established by the Commissioner on Englewood and Englewood Cliffs students attending school below eighth grade in the Tenafly district on April 18, 1988. Similarly, while the Cliffs Board also urges vacation of the injunction, it too makes no argument on behalf of its resident students affected by the Commissioner's modification of the ALJ's recommended decision.[1]

Thus, since the Intervenor's interest in the outcome of this matter is direct and substantial, and insofar as her interest is not adequately represented by the existing parties, we grant her motion to intervene for the limited purpose of presenting her position that the eighth grade cut-off established by the Commissioner was arbitrary and without a basis in law.

We do not find that oral argument is necessary to a fair determination of this action, and the Intervenor's request for such is therefore denied.

We also grant Intervenor's request to seal all materials before us concerning her emotional state, and we therefore direct that all documents relating to the emotional state of the Intervenor, including any and all reports and affidavits of any medical or psychological professional, shall be sealed and not made available to anyone other than the State Board and the parties to this litigation.

November 1, 1988

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[1] It should be noted that the Cliff Board's motion to the Commissioner for a partial stay of his decision so that 14 students living in Englewood Cliffs and accepted for attendance at THS for the 1988-89 school year would be permitted to attend THS, involved only eighth grade students on April 18, 1988 who had been accepted by THS for the 1988-89 school year but who were not then attending school in the Tenafly district. (13 of the students were attending eighth grade in Englewood Cliffs and 1 was attending a private school.) These students were, therefore, not affected by the eighth grade cut-off established by the Commissioner, which affected only students below the eighth grade on April 18, 1988 who were then attending school in the Tenafly district, and the Englewood Board's reliance on this motion in opposing the instant intervention motion is misplaced. (The stay was denied by the Commissioner on September 1, 1988.)

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NOS. EDU 3129-86,
EDU 8818-86
AGENCY DKT. NOS. 87-3/86,
387-11/86
(CONSOLIDATED)

IN THE MATTER OF THE TENURE HEARING OF PAMELA COOPER, BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY,

---

James L. Jackson, Esq., for the Complainant Board
Steven R. Cohen, Esq., for the Respondent (Selikoff & Cohen, attorneys)

Record Closed: February 4, 1988 Decided: May 16, 1988

BEFORE LILLARD E. LAW, ALJ:

STATEMENT OF THE CASE

The Board of Education of the City of Pleasantville (Board), on two separate occasions certified a series of charges against Pamela Cooper (respondent), a tenured teaching staff member in its employ, to the Commissioner of Education, pursuant to N.J.S.A. 18A:6-10 et seq. The charges allege, among other things, that respondent is incompetent to perform her duties as a guidance counselor and that her conduct is unbecoming a teaching staff member and, thus, she should be dismissed from her tenured position. Respondent denies the charges and requests her immediate reinstatement with back pay and restoration of all the emoluments to which she is entitled.

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PROCEDURAL ASPECTS

The Commissioner of Education transmitted these matters with the directive that they be consolidated and for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

This matter has been protracted due to a variety of factors including; the Board's filing of two separate sets of charges against respondent, the substitution of respondent's attorney due to an apparent conflict of interest, the number of scheduled days to complete the hearing process and, not the least of which was the illness and hospitalization of the undersigned during scheduled hearing dates which necessitated the rescheduling long after normal adjournment periods.

Subsequent to the last day of hearing, the parties requested and were granted leave to submit post hearing proposed findings and their respective legal arguments. The last submission was received on February 4, 1988, which constitutes the record closing date.

THE CHARGES

The charges to which the Board certified to the Commissioner, if found to be true in fact, would warrant respondent's dismissal from her tenured employment position as set forth hereinbelow as follows:

1. She certified a student, S.M.K. for graduation and caused the said student to graduate when she knew or should have known that the student had not met the course credit requirements for graduation.

2. She placed a student, D.M., on a course schedule which was improper and illegal in light of New Jersey Department of Education requirements.

3. As a result of her acts or omissions, the results of the Preliminary Scholastic Aptitude Test, taken on October 22, 1985 by approximately 35 college bound underclassmen in the Pleasantville School District, have been lost.

4. She improperly reported the Minimum Basic Skills scores of school district students. She also failed to take proper action with regard to students who had not passed the Minimum Basic Skills test.

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5. In her capacity as a guidance counselor she misinformed the parents of A.J., a school district student, regarding the student's credit status and the courses taken.

Ms. Cooper has engaged in conduct unbecoming a teaching staff member in that:

6. During the school year 1984-85, she used her position as a guidance counselor to change grades earned by a student, M.M., without authorization to do so.

7. During the school year 1984-85, she placed in the records of a student, A.J., a full year of credit for a course, the said student, had not taken.

8. During the 1984-85 school year she gave credits to a student, V.L., which the said student had not earned and changed grades previously given to the same student by her classroom teachers.

9. In her capacity as a guidance counselor she placed in the records of a student, M.M., credit for a course he had failed, and placed in the same student's records, twice the earned credit for a physical education course.

10. In her capacity as a guidance counselor she changed the grade given to A.M., a transfer student, by the school district from which he transferred.

11. In her original application for employment in the Pleasantville School District she intentionally misrepresented her certification status.

12. She has, since first hired in September, 1978, misrepresented her graduate school credits and has caused herself to be paid at a higher level on the school district salary guide than she should have.

13. She has been insubordinate and in direct defiance of directives given to her by her supervisor and superiors within the Pleasantville School District.

14. She falsified certain documents concerning school related activities for the purpose of defrauding the Internal Revenue Service of the United States Government.

STIPULATION OF WITHDRAWAL

The Board, at the hearing and by way of the prehearing order, stipulated that it withdrew and abandoned charges nos. 3, 10, 11 and 12. Therefore, those four enumerated charges will not be considered here.

TESTIMONIAL AND DOCUMENTARY EVIDENCE

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A recital of the testimony adduced at the hearing is summerized below and, where appropriate, the referenced documents moved into evidence are either cited or reproduced with regard to the parties respective positions relating to the individual charges.

CHARGE NO. 1

The new Superintendent of the Board's schools, John F. Garrity, testified at length on behalf of the Board including, among others, Charge No. 1 where respondent is charged of being incompetent as a consequence of a former pupil under respondent's guidance having been graduated from the Board's high school with less than the required number of credits. The Superintendent testified that 120[1] credits were the minimum required for graduation and his review of former pupil S.M.K.'s transcript demonstrated that she had earned only 83-3/4 credits (P-3)[2]. S.M.K. was awarded a high school diploma by its former principal, George William Reeves, in January 1984.

Respondent testified, among other things, that S.M.K. was one of her counselees during the 1982-83 school year. Respondent asserted that toward the end of the 1982-83 school year respondent noticed that S.M.K. would not have a sufficient number of credits to graduate from the high school and so advised the pupil and her parents by letter. Respondent testified that she personally placed a copy of the letter sent to the parents in S.M.K.'s file, however, no such letter was found prior to or at the hearing. Subsequent to the letter having been sent to the parents and respondent having advised the principal of the problem, a meeting was convened by Principal Reeves with S.M.K.'s mother and S.M.K. Reeves testified that he was in receipt of pupil report cards and that he personally spoke with any and all senior pupils (twelfth grade) who were failing any subject regardless of whether it

1. There was contradictory testimony with regards to the number of credits required to graduate from Pleasantville High School. The record demonstrates that 92 credits were required by the regulations adopted by the State Board of Education. Pleasantville required 110 credits for 1983. The Pleasantville High School Student Handbook for 1982-83 indicated that 120 credits were required for the 1985 graduation year.

2. The chain of custody of the Board's exhibits is considered post.

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affected his/her graduation. Reeves further asserted that at the end of the third quarter of the school year, he relied upon the guidance counselors to review senior pupil records and that he personally wrote and sent letters to pupils who were failing a course that would affect their graduation. Reeves could not locate such a letter in S.M.K.'s file.

Although Reeves could not recall the meeting with S.M.K. and her parents, S.M.K. testified that she and her mother met in Reeves office where the principal had what S.M.K. believed to be her pupil's records. S.M.K. testified that she did not graduate in June 1983 and that Reeves informed her that she would be required to take two courses of English and one of physical education (gym). One English course and the physical education course were to be completed during the 1982-83 summer school and the second English course to be completed in the fall semester of 1983. S.M.K. asserted that during the meeting, Reeves had what she thought to be her records on his desk. S.M.K. testified that she successfully completed the course work as prescribed by Reeves and that the principal handed S.M.K. her diploma in January or February of 1984.

Respondent testified that prior to the meeting with the principal, S.M.K. and S.M.K.'s mother; Reeves requested that respondent provide Reeves with S.M.K.'s cumulative record folder, which respondent did. Respondent did not attend the meeting, however, subsequent thereto, Reeves called respondent into his office and returned S.M.K.'s files to respondent with the directive that respondent was to take S.M.K. and her mother to respondent's office to complete the summer school registration for S.M.K. Respondent did so and testified that S.M.K. had successfully completed those courses prescribed by Reeves.

Respondent asserted she did not recommend to Reeves that S.M.K. receive her high school diploma. Reeves, on the other hand, testified that he relied upon respondent's recommendation for the issuance of S.M.K.'s diploma. The Board introduced P-4 into evidence which is an unsigned letter dated January 31, 1984, addressed to Dr. Reeves asserting that S.M.K. had completed the courses required by the Board and that S.M.K. was eligible to receive her high school diploma. Although the letter has respondent's name typewritten at the bottom of the letter, it is unsigned. Respondent denies she sent such a letter and Reeves has no independent knowledge or recollection that he was in receipt of such a letter. It is

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uncontested that Reeves, as the principal of Pleasantville High School, had the ultimate responsibility for the certification of the pupils for graduation from the school.

FINDINGS AND CONCLUSIONS

I **FIND** and **CONCLUDE** that the Board has failed to meet its burden of proof, by a preponderance of the credible evidence, to support Charge No. 1. Although the facts undisputedly demonstrate that S.M.K. failed to meet the Board's graduation requirements, whatever they might have been in 1984, or to even meet the minimum State Board standards, there is a lack of evidence to support the Board's charge that it was respondent who allowed or permitted S.M.K. to be awarded a diploma and graduate from the Board's high school. The facts herein demonstrate that respondent gave notice to Reeves, the then principal of the Board's high school, that S.M.K. was lacking sufficient credits to graduate in June 1983. By Reeves own admission he would, under such circumstances, write a letter to the pupil and the pupil's parents to make arrangements to meet with the principal in order that a course of action for the pupil's educational future could be designed and carried out. Although Reeves does not recall the meeting between himself, S.M.K. and S.M.K.'s mother, S.M.K. certainly does. Reeves does not suggest nor assert that such a meeting did not occur. He merely states that he does not recall. S.M.K. on the other hand recalls the meeting and that Reeves had, what she believed to be, her school records in front of him on his desk when the principal declared that S.M.K. would have to attend summer school and successfully complete one course in English and one course in physical education. S.M.K., who testified she was unhappy about the arrangement asserted that she attended and completed the summer school courses as well as one selection of English during the fall-semester of 1983-84, which Reeves required her to do.

The facts further demonstrate that Reeves required respondent to register S.M.K. in the summer school program, which respondent did. The record also shows that S.M.K.'s End-of-Year Transcript (P-3) had white-outs (erasures), cross-outs and statements to which there is no attribution. Notwithstanding that Reeves testified he delegated responsibility to the guidance counselors with regard to advising him on the graduation status of pupils, it is undisputed that respondent did so with respect to S.M.K.'s lack of credits for a June 1983 graduation. It is further

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undisputed that Reeves, acting in his capacity as principal of the Pleasantville High School, granted S.M.K. a diploma and certified that she had met all of the graduation requirements of the Board and State subsequent to her successful completion of courses prescribed by Reeves. There is nothing on the record to demonstrate that respondent did anything other than to follow Reeves directives.

I **FIND** and **CONCLUDE**, therefore, that the Board has failed to carry its burden to sustain Charge No. 1. Accordingly, I **CONCLUDE** that Charge No. 1 is hereby **DISMISSED**.

CHARGE NO. 2

The facts with respect to this charge are set forth below as follows:

Superintendent Garrity testified, among other things, that a pupil, D.M., entered the Pleasantville High School ninth grade from the North Main Street Elementary School in September 1984 for the 1984-85 school year and that respondent was D.M.'s assigned guidance counselor. While attending elementary school, D.M. was subject to the New Jersey Department of Education standardized Comprehensive Test of Basic Skills i.e., (C.T.B.S.), which he failed to pass. Pupils, such as D.M., who failed to pass the C.T.B.S. were then subject to be enrolled in Basic Skills Instruction (BSI) classes for remedial instruction. Mr. Paul Hirschy was D.M.'s eighth grade guidance counselor and scheduled D.M. into ninth grade B.S.I. classes for the 1984-85 school year. Pupils were to remain in the B.S.I. classes until they successfully passed the State Minimum Basic Skills test (M.B.S.). Superintendent Garrity testified that he did not know what B.S.I. classes were offered or available to D.M. for the 1984-85 school year.

The record demonstrates that D.M. was enrolled in the high school from September 1984 until sometime in November 1984 at which time D.M. left the school (P-7). During the period September - November 1984, D.M. was absent 25 days and tardy on three occasions. During the period September - November 1984, D.M. was assigned to M.B.S. Reading, M.B.S. Mathematics in addition to nine other subjects. D.M. received the grade of "F" in all subject areas including the two M.B.S. classes (P-7).

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The regularly scheduled M.B.S. test was scheduled state-wide for March 1985. D.M. was not enrolled in the Board's schools in March 1985, therefore, he did not take the M.B.S. test under the Board's supervision. D.M. returned to the Board's high school in September 1985. Respondent again was assigned as D.M.'s guidance counselor and treated D.M. as a new pupil enrollee. Respondent testified, among other things, that inasmuch as D.M. did not take the state-wide M.B.S. test she administered a practice M.B.S. test to D.M. The Superintendent testified that if a pupil passed the M.B.S. practice tests, that pupil would not be eligible nor required to be enrolled in any remedial basic skills courses offered by the high school. Respondent testified that D.M. passed both sections of the M.B.S. test; i.e., reading and mathematics. Therefore, respondent enrolled D.M. as a repeat ninth grade pupil in regular, non-remedial courses (P-8, P-9). Respondent testified she enrolled D.M. in regular courses of study in reliance upon a memorandum issued by Gerald Craven, Supervisor, dated June 3, 1985 (R-12) which was an extension of a memorandum issued by Richard Mower, dated December 12, 1984 (R-11) dealing with new students entering Pleasantville High School. Respondent testified she placed D.M.'s M.B.S. entire practice test in D.M. cumulative file folder subsequent to D.M.'s successful passage of the test. However, D.M.'s M.B.S. practice test was not found therein on the day respondent testified in these proceedings.[3] Respondent asserted that D.M. subsequently, in or about January 1986, dropped out of the high school (R-13).

I hereby adopt the above paragraphs as my **FINDINGS OF FACT** with regard to Charge No. 2.

CONCLUSIONS

A thorough review of the herein record demonstrates that the Board has failed to carry its burden of proof that respondent placed D.M. in a course of study which was either improper or illegal for the 1985-86 school year. D.M. was not an enrolled pupil in the Board's high school for the entire 1984-85 school year because he dropped out of school sometime in November 1984 as a ninth grade pupil. D.M. was not in attendance in the Board's school in March 1985 when the State-wide

3. See footnote 2.

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M.B.S. test was administered. D.M. appeared on the school scene again in September 1985 whereupon respondent, in accordance with the accepted school procedure concerning new pupils, administered a practice M.B.S. test which D.M. successfully passed. In view of D.M.'s successful passage of the M.B.S. test and the accepted procedures thereto (R-11, R-12), respondent enrolled D.M. in regular, non-remedial course selections.

Accordingly, I **CONCLUDE** that Charge No. 2 be and is hereby **DISMISSED**.

CHARGE NO. 4

This charge arose, in part, as a consequence of a memorandum issued by the then Superintendent of Schools, Kenneth E. Weaver, to the then Assistant Superintendent, John Garrity (now Superintendent) and George Reeves, the then high school principal (P-12). The Superintendent's memorandum, dated January 2, 1985, stated as follows:

> This memo confirms my directive to each of you to verify those students that have not passed the Minimum Basic Skills (M.B.S.) test. This review should be made by going through each individual record. Students will be grouped into the following categories:
>
> 1) Meets graduation requirements, but has failed M.B.S. test (Special Review Assessment should be reviewed).
>
> 2) Does not meet graduation requirements and has not passed M.B.S. test.
>
> 3) Has passed M.B.S. test, but does not meet graduation requirements.
>
> 4) Meets M.B.S. requirements and graduation standards at check date.

The need for this review is to insure that the classes of 1985, 1986 and 1987 will be given the maximum time to study and retake the M.B.S. test before graduation or complete the Special Review Assessment processes.

I need this process to be completed by Friday, February 15, 1985. This should be a written report, and the parents/guardians and those on the list should also be officially notified of their child's status (P-12).

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Mr. Garrity testified, among other things, that he was personally involved in the P-12 directive from Superintendent Weaver in a process which he identified as the Student Review Assessment (SRA). The S.R.A. came into play where a pupil met all of the Board's graduation requirements, however, the student had failed to pass the state-wide test of M.B.S. Garrity testified that he personally checked the records of all the twelfth grade pupils to determine whether they had successfully passed the M.B.S. test. Garrity asserted that he retrieved those data from a computer print-out of all senior (twelfth grade) pupils and compared it with the pupil records of the three high school guidance counselors responsible for maintaining such records. Garrity made arrangements to meet with the three guidance counselors individually to review pupil records in compliance with the Superintendent's directive (P-12). Garrity admitted he met with the two male members of the guidance staff, however, he did not meet with respondent as he had promised and as she had anticipated. Subsequent to Garrity's meeting approximately one hour each with Mr. Langer and Mr. Strickler, Garrity stated he had to attend a meeting and, therefore, did not have the time to meet with respondent. Respondent, moreover, had prepared a draft of a "hand-audit" of those pupils for which she was responsible, dated January 4, 1985, and delivered it to Garrity before he left for his meeting (P-13). Garrity testified that he subsequently compared respondent's list of potential 1985 graduates with failing MBS scores (P-13) with his own list of pupils and discovered a variety of mistakes on respondent's document; i.e., M.B.S. mathematic and reading scores reversed, "v" for verbal test scores did not meet the minimum passing score of 75 for pupils respondent assessed as eligible for graduation and the report of inaccurate test scores for a pupil who was eligible to graduate (P-13).

Mr. Garrity testified that he subsequently requested that the principal take immediate steps to correct the errors on respondent's report (P-13). Garrity did not contact respondent with respect to P-13. On or about January 18, 1985 (P-14), respondent submitted a corrected hand audit to the high school principal. Garrity admitted he had seen the document prior to the hearing but was not certain as to how he came into possession of the exhibit (P-14)..

Respondent testified, among other things, that on December 21, 1984, the high school principal directed a memorandum to the three guidance counselors

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requiring them to complete a hand-audit on every senior pupil to determine the following:

1. Whether or not the senior has taken the MBS test.
2. Whether or not the senior has passed the MBS test.
3. Whether or not the senior has failed the MBS test (R-14A).

The principal further instructed the guidance counselors that all results must be recorded on the pupil's permanent folders and:

> All results must be recorded on their permanent folders.
>
> After the seniors have been completed, you will do the same for juniors and sophomores since these students must also pass the MBS test in order to graduate (R-14A).

Subsequent to her return from the Christmas holiday break, respondent determined that the principal's directive be given first priority and she, in conjunction with the two male guidance counselors, executed a hand-audit. By way of memorandum and attachments dated January 2, 1985, the three guidance counselors submitted the hand-audit to the principal (R-14B, R-14C). At a staff meeting on the same day, January 2, 1985, and after the counselors had submitted their individual and collective hand-audits to the principal, principal Reeves submitted to the counselors a copy of a memorandum from the Superintendent which is P-12 herein.

Respondent testified that as a consequence of R-14A and P-12, a meeting was planned to be held in January 1985 with the guidance personnel, principal Reeves and Richard Mower, Director of Funded Programs, in attendance (Mower was assigned the responsibility to supervise and oversee the guidance department, among other things). Respondent understood that Mower was to supply the guidance counselors with an updated list of pupils who had not passed the MBS, which would effect those pupils graduation status. The meeting with Mower and Reeves was never held. A subsequent meeting was planned with Garrity to complete a hand-audit of each of the counselors pupil files to insure that no senior pupil would not be able to graduate because of the lack of an MBS score. Garrity did in fact conduct a hand-audit with guidance counselors Langer and Strickler but not with respondent. Garrity did not indicate to respondent why he did not have

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the time to conduct the hand-audit with respondent. Nevertheless, respondent prepared the document P-13 and presented it to Garrity.

Respondent testified that she did not have the opportunity to edit or review P-13 before she submitted it to Garrity. Subsequently, respondent discovered a variety of errors committed by the typist, Cathy Henry. Respondent did not contact Garrity with respect to the transposition errors on the document nor did Garrity contact respondent with respect to his discovery of errors on P-13. Respondent, however, corrected the errors which appeared on P-13 and submitted P-14 to principal Reeves. Garrity, in the meantime, contacted the principal and requested Reeves to "write-up" respondent; i.e., a written form of disciplinary action by the school's administration. The principal advised respondent that Garrity had requested Reeves to write-up respondent and Reeves did so without affording respondent the opportunity to explain the errors on P-13 or causes for the errors.

FINDINGS AND CONCLUSIONS

Charge No. 4 states, in part, that respondent improperly reported Minimum Basic Skills scores of school district pupils. Taken alone and standing by itself, the charge is true. However, it can not stand alone given the testimony of both Garrity and respondent. The facts demonstrate, and I so find, that Garrity had made appointments to meet with the three guidance counselors to conduct a hand-audit of pupil test scores in compliance with the Superintendent's directive (P-12). Garrity met with the two male guidance counselors, Messrs. Langer and Strickler and did, in fact, conduct a hands-on hand-audit of their respective pupil records and test scores. However, for whatever reason or reasons, Garrity did not meet with respondent nor did he suggest or arrange for an alternate meeting to conduct a hand-audit of her pupil test records. Instead, respondent, as a courtesy to Garrity, prepared a written hand-audit (not required by respondent or the two male counselors) for the principal and delivered a copy to Garrity. Respondent did not have an opportunity to review the document (P-13). However, when she discovered errors on the document she corrected those errors and submitted a corrected copy to the principal (P-14).

For the Board to charge respondent with the offense of improperly reporting MBS scores without recognizing the fact that respondent corrected any clerical

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errors that existed, is only telling one-half of the story. Such behavior on behalf of the Board and/or its agents is irresponsible, reprehensible and not to be condoned. Garrity's conduct with respect to this charge is highly suspect given the fact that he failed to meet with respondent, the only black female counselor, to conduct a hands-on hand-audit of pupil test scores as he had with the other guidance counselors and then to charge respondent with the improper reporting of pupil MBS test scores when, in fact, she had corrected the reported errors.

As to the second portion of Charge No. 4 where the Board alleges that respondent failed to take proper action with regard to pupils who had not passed the MBS test, Garrity refuted his own testimony in support of the charge. Garrity admitted, among other things, that after he took the time to review pupil J.M.'s records, the source of this portion of the charge, Garrity recognized that J.M. had in fact taken the required remedial course of study.

I **CONCLUDE**, therefore, that there is no basis in fact to support Charge No. 4 and, accordingly, it is hereby **DISMISSED**.

CHARGE NO. 5

This charge alleges that respondent misinformed the parents of a pupil, A.J., regarding the pupils course credit status together with the courses taken by A.J.

UNCONTESTED FACTS

A careful review of the record reveals certain facts, with regard to this charge, which are neither in dispute nor contested. These uncontested facts are set forth hereinbelow as follows:

A.J. commenced her high school education program at the Board's high school in September 1983 for the 1983-84 school year, after being held back one year at the eight grade level because of behavior problems. A.J. was classified by the Board's Child (Youth) Study Team (CST) as emotionally disturbed (E.D.) and subsequently placed in a contained classroom for the 1983-84 school year (P-17, P-18). In March 1984, A.J. left the E.D. contained classroom setting and was enrolled in the Board's PACE program. The PACE program functioned as an educational

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program for pregnant pupils awaiting the birth of their infants. A.J. attended the PACE program for approximately eight days after which she was hospitalized for pregnancy related disorders; i.e., high blood pressure. Subsequently, A.J. was placed on home instruction (H.I.) where respondent was A.J.'s H.I. teacher. It is not clear whether A.J. returned to the E.D. self-contained classroom setting in June 1984, after the birth of twins.

A.J.'s classification of E.D. by the Board's CST occurred on May 26, 1983, while A.J. was an eighth grade pupil. The classification was as a consequence of A.J.'s frequent behavior problems in the school setting where she developed an extensive discipline record for fighting, using foul and abusive language, frequent truancy and disturbing the classroom, among other activities. The CST also determined that A.J. functioned at the fourth grade level in reading and mathematics. Upon her entry into the Board's high school ninth grade, A.J.'s Individualized Educational Program (IEP) called for her to attend the ninth grade Resource Room for reading and mathematics, as the least restrictive environment, and to be mainstreamed in all other courses. On October 21, 1983, the CST executed an addendum to A.J.'s IEP, with the written approval and consent of A.J.'s mother, which changed her instructional program to a contained classroom setting due to A.J.'s behavior and discipline problems.

During the 1983-84 school year, A.J.'s CST case manager was Mr. Edward Thomas, Sr. From October 21, 1983 until March 1984, A.J.'s contained classroom teacher was Mr. Michael Hughes. A.J.'s PACE teacher was Harriet Devlin and, as set forth before, respondent was A.J.'s H.I. teacher from April 3, 1984 to June 1, 1984.

Janice Dennis, the Board's Director of Special Services until her resignation in July 1986, testified without contradiction that A.J. was a classified pupil and with regard to any classified pupil the full CST was required to evaluate any and all proposals which would result in a change of schedule. Dennis testified, among other things, that a review of the records of the Special Education Department and, specifically A.J.'s file, did not indicate that such a review or evaluation did not occur with regard to A.J. between October 1983 and June 1984.

There is no dispute that respondent generated a letter to A.J.'s mother, dated June 6, 1984, setting forth a summary of A.J.'s "current progress" and total credits

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A.J. needed for graduation in June 1986 (P-16). The manner in which the letter (P-16) was generated and its informational content are in dispute and is discussed below:

CONTESTED FACTS

Respondent testified that she became acquainted with A.J.'s mother during the 1983-84 school year and talked with A.J.'s mother about A.J.'s school attendance record and her academic and personal problems. A.J. had exhibited anti-social behavior which was reflected in her school classes, cutting of classes and her becoming sexually active in her social life. In the spring of 1984, A.J.'s mother was concerned that A.J. would be delayed in graduation from the high school because of the course of study prescribed by the CST. A.J.'s mother also believed that A.J. was being punished for disciplinary actions and reasons through the CST course selection.

As a consequence of those concerns expressed by A.J.'s mother, respondent met with Edward Thomas, A.J.'s CST case manager, and reviewed A.J.'s CST file. Thereafter, respondent scheduled a meeting for June 5, 1984 with respondent, Thomas and A.J.'s mother in attendance. At that meeting, A.J.'s mother questioned the course selection afforded A.J. and her placement into CST courses. The mother asserted that the courses to which A.J. was assigned did not challenge A.J. and, she opined, contributed to A.J.'s behavioral problems. A.J.'s mother, therefore, requested that Thomas and respondent prepare a course selection for A.J.'s future at the high school. As a result of the mother's request, respondent projected a four-year academic course selection for A.J. which was discussed by the mother and Thomas prior to respondent sending a copy on to A.J.'s mother. Thomas agreed with respondent's course selections for A.J.'s projected program, a copy of which was forwarded to the CST (P-16). Because A.J. fell under the CST's jurisdiction by virtue of her handicapping classification, the CST had the primary responsibility for scheduling A.J.'s high school courses of study rather than respondent. There is nothing in the record before this tribunal which demonstrates that the members of the CST, Mr. Thomas or the Board's administrative staff disagreed with respondent's outline schedule of courses for A.J. as set forth in P-16 in evidence.

FINDINGS OF FACT

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A careful review of P-16 and the testimony with regard thereto shows that respondent reported, on the face of the letter to A.J.'s mother, that A.J. had earned a total of 40 credits in the Board's PACE Program Courses for the 1983-84 school year, when A.J. was a ninth grade pupil. The testimony of Ms. Harriet Devlin, the PACE teacher when A.J. was enrolled in the program, demonstrated that none of the courses identified on P-16 were PACE PROGRAM COURSES but, rather, those courses as listed on P-19 were the courses taken and grades earned by A.J. for the limited time A.J. was in the PACE program. The ten courses respondent listed on P-16 were not the courses taken by A.J. when she was removed from the mainstream classroom activities and placed in the contained-classroom instructed by Mr. Hughes (P-17, P-18). The testimony further demonstrated the difficulty of earning 40 credits during the course of a school year, even by an outstanding pupil, let alone a classified pupil whose reading and mathematics performance was on the fourth grade level.

Notwithstanding respondent's reporting that A.J. had earned a total of 40 credits during the 1983-84 school year, A.J.'s ninth grade, a review of respondent's summary or "Overview of Possible Credit Status' shows something entirely different (P-16, page 2). The record shows that respondent reported to A.J.'s mother that A.J. had earned a total of 16 credits during her ninth grade program (P-16). Presumably, five of those credits were earned in summer school where A.J. was enrolled in and successfully passed an English course.

CONCLUSION WITH RESPECT TO CHARGE NO. 5

I **CONCLUDE** that the Board's charge that respondent misinformed the parents of A.J. regarding A.J.'s credit status and courses taken during the 1983-84 school year is true in fact. There is no evidence that A.J. was enrolled in or successfully completed those courses respondent identified as PACE Program Courses for 1983-84. Nor was there any evidence that A.J. earned 40 credits for the 1983-84 school year. I further **CONCLUDE** that respondent did, in fact, report the number of 16 ninth grade credits earned by A.J. in respondent's "Overview of Possible Credit Status" for the 1983-84 school year. Notwithstanding, the Board's charge is true and, accordingly, is hereby **SUSTAINED**.

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CHARGE NO. 6

The Board failed to submit any competent evidence in support of this charge that respondent used her position as a guidance counselor in the 1984-85 school year to change grades earned by pupil M.M., without authorization. The evidence presented by the Board's own witness clearly demonstrated that the changes to M.M.'s grades were by the Board's H.I. teacher, Sylvia Denise Briscoe, an elementary teacher in the Board's employ.

The facts with regard to this charge are these:

Pupil M.M. was placed on H.I, during the third-quarter marking period in the 1984-85 school year. Prior thereto, M.M. was enrolled in the regular ninth grade course of study assigned to classes in; vocational education survey, English 1, general science, algebra 1, freshman health, introduction to art, freshman physical education, freshman human relations and geography of eastern cultures (P-20). Ms. Briscoe testified she tutored M.M. in all of the above courses except freshman physical education during the third and fourth quarters of the 1984-85 school year. Ms. Briscoe testified, on direct examination, that she did not instruct M.M. during the first and second quarters of the 1984-85 school year, yet she struck out the grades issued to M.M. by other teachers for those two quarters and placed her handwritten grades in their stead (P-21). She asserted that she placed the grades on M.M.'s Achievement Record (Report Card) subsequent to a telephone call to respondent where, Briscoe asserts, respondent advised the H.I. teacher to give M.M. the grades he deserved. Ms. Briscoe also asserted she placed an "M" on M.M.'s report card for freshman physical education on the advice of respondent without knowing what the "M" stood for (M = medical). On cross-examination Briscoe admitted that respondent did not instruct Briscoe to change any grades on M.M.'s report card (P-21). Thereafter, respondent advised other individuals of Briscoe's submission of M.M.'s grades to the Guidance Department (P-22).

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I adopt the above-referenced testimony as my **FINDINGS OF FACT** and **CONCLUDE**, therefore, that the Board has failed to sustain the charge by any standard of proof. Accordingly, Charge No. Six is hereby **DISMISSED**.

CHARGE NO.7

Charge No. Seven is related, in part, to Charge No. Five which involves pupil A.J. In Charge No. Seven, the Board alleges that during the 1984-85 school year, respondent placed in A.J.'s school record credit for full year course which A.J. had not taken.

As demonstrated from the facts in Charge No. Five A.J. was a classified pupil, pursuant to N.J.S.A. 18A:46-1 et seq. and N.J.A.C. 6:28-1.1 et seq. As a consequence of A.J.'s classification, A.J. was under the jurisdiction of the CST and the direct supervision of Mr. Thomas, A.J.'s case manager. The record also revealed that following the completion of the regular 1983-84 school year, A.J. attended summer school in the summer of 1984 upon the advice of Mr. Thomas and successfully completed a course in English 2, or tenth grade English, with a grade of "C" (P-16, P-25).

The Board's Permanent Record Card (PRC) for A.J. appears to be a copy of a portion of P-16, which was the letter sent from respondent to A.J.'s mother subsequent to the June 5, 1984 meeting with A.J.'s mother, Mr. Thomas and respondent (P-34). The Superintendent testified that A.J.'s PRC was unusual because it did not have labels affixed thereto but, rather, the record consisted of pieces of cut-out paper (P-16) affixed to the PRC with plastic, scotch type tape.

Evelyn DeLaurentis, now secretary to the assistant principal who maintains PRC's, asserted, among other things, that she had no special recollection with regard to A.J.'s PRC, however, she could identify her handwriting on the top of the document (P-34). DeLaurentis contradicted the Superintendent's testimony to assert that it was not unusual to have bits of paper affixed to a PRC.

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Mr. Robert Strickler, guidance counselor, testified, among other things, that pupil grades which appear on the PRC are supplied by the pupil's teachers. The teachers submit the pupils grades to the Guidance Office where the grades are then placed in its computer which subsequently generates grade labels for placement on the pupil's PRC. Mr. Strickler emphasized that all pupil grades are generated by the teachers, not guidance counselors. He also testified that PRC cards were kept by DeLaurentis and not by the guidance office.

The exhibits in evidence, P-34, A.J.'s PRC and P-25, a transcript of A.J.'s class record both reflect that A.J. was enrolled in two Comp SK 2 (Computation Skills 2) where she received grades of C and D respectively. Both documents (P-34, P-25) indicate that A.J. was enrolled in the Board's 1984 summer school English 2 course. Exhibit P-25 indicates that A.J. received the grade of "C" for the English 2 course taken during the 1984 summer school session.

FINDINGS OF FACT

There is no dispute that A.J. was not enrolled in, nor did she complete, any course entitled Comp SK 2 as indicated on exhibits P-16, P-25 and P-34. Nor was there any evidence proffered at the hearing to demonstrate that it was respondent who placed the incorrect information in A.J.'s PRC. The record shows that A.J. was a classified pupil under the jurisdiction of the Board's CST and supervision of Mr. Thomas, rather than respondent. The record further shows that A.J.'s teacher or teachers did not submit subject matter grades for A.J. to be transmitted to the Guidance Office computer for its generation of sticker labels for A.J.'s PRC. How a portion of P-16 became affixed to A.J.'s PRC is purely speculation and cannot be attributable to respondent.

CONCLUSIONS

Therefore, I **CONCLUDE** that while the information affixed to A.J.'s PRC was incorrect and misinformation concerning courses and credits A.J. was purported to have taken and earned, the Board failed to establish, by a preponderance of the credible evidence, that it was respondent who affixed the misinformation to A.J.'s PRC. Accordingly, the charge as alleged in Charge No. Seven is hereby **DISMISSED**.

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CHARGE NO. 8

This charge alleges that respondent gave credits which were not earned to pupil V.L. in the 1984-85 school year and, further, that respondent changed grades given to V.L. by other teachers. At the hearing, respondent moved to dismiss Charge No. Eight grounded upon the assertion that the Board could not establish a chain of custody for the pupil's records nor could it account for the tampering of V.L.'s Achievement Record (P-27, P-28, P-29). This tribunal, which held respondent's motion in abeyance, now grants the motion and holds that Charge No. Eight is **DISMISSED** for the reasons set forth hereinbelow.

The Board introduced and moved into evidence three documents (P-27, P-28, P-29) through its Superintendent John Garrity, all of which are identified as the Achievement Record of pupil V.L. The three documents each have different typewritten information imprinted thereon and one document (P-28) contains handwritten grades and credits earned together with a handwritten note executed by respondent. Garrity testified that the original Achievement Record was not in pupil V.L.'s file and that clerical workers, administrators and others had access to pupil records and files. Garrity asserted that pupils also work in the guidance office. Garrity could not account for the different information contained on the three documents nor could he testify with any degree of certainty that the pupil's records were secured under lock and key. Garrity could not account for the tampering of the original of P-29.

S. Gerald Craven, Assistant Principal, testified, among other things, that he became the supervisor of the guidance department in the 1984-85 school year. He asserted that pupil records and grades could be changed through the guidance department computer terminal which was the responsibility of Ellen Cohen, guidance department secretary, for in-putting pupil grades and pupil schedule changes. Craven testified that errors and schedule changes appeared on pupil Achievement Records and computer printouts. In or about April 1985, Craven had the computer removed from Cohen's guidance office and placed it in Craven's

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office. Craven testified that he had been informed by Ellen Cohen that respondent had changed V.L.'s grades.[4] Craven asserted that he had found more errors in pupil grades submitted by respondent than he had found submitted by the other two guidance counselors. He testified also that he did, in fact, find input errors submitted by the other two counselors, however, no disciplinary action was ever taken against them. Craven testified that he had not authorized respondent to change V.L.'s grades.

Respondent testified that Craven not only authorized her to change the grades on V.L.'s Achievement Record, Craven instructed respondent to do so. Respondent testified that V.L. was given grades of "F" for the first quarter of the 1984-85 school year by her classroom teachers. During the first two quarters of the school year V.L.'s absences were such as to have earned her the grades of "U" for the course work; i.e., unable to give grades due to insufficient time in class (Key to Marks, P-28, P-29, P-30). Upon respondent's discovery of the grading problem of V.L., respondent reported it to Craven. Craven, thereupon, instructed respondent to tutor V.L. for course work from the first and second quarters and to give V.L. grades for those quarters. Respondent complied with Craven's instruction and issued grades to V.L. for the two quarters with Craven's approval.

In addition to instructing respondent to tutor V.L., Craven created a new Office Practice course computer number to reflect the amount of credits earned by V.L. during the school year. Craven then entered the information into the computer terminal located in his office. Craven entered the information incorrectly by giving V.L. five credits for the new Office Practice course instead of the two and one-half credits she had actually earned. Respondent detected the error and changed the Achievement Record to reflect the correct number of earned credits.

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4. There was an apparent conflict between Ellen Cohen and respondent which will be discussed, post. Ellen Cohen resigned her position as guidance secretary shortly after Gerald Craven was appointed supervisor over the guidance department.

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CONCLUSIONS

Mr. Craven's testimony must be measured as to its credibility with regard to this charge as well with other charges. In his testimony with respect to Charge No. 6, Craven originally testified that he had not authorized any grade change for pupil M.M. Subsequently, Craven admitted that he had authorized such a grade change for M.M. Here, Craven's testimony is both inconsistent and conflicting. Credibility is a major factor in evaluating testimony. Both the witness and the testimony itself must be credible. *In re Perrone*, 5 N.J. 514, 522 (1950).

I **CONCLUDE** that Craven's testimony is lacking in credibility and, therefore, is hereby rejected.

Thus, I **CONCLUDE** that the Board has failed to prove Charge No. 8, by a preponderance of the credible evidence.

Accordingly, Charge No. 8 is hereby **DISMISSED**.

CHARGE NO. 9

Mrs. P., mother of former pupil M.M. now deceased, testified that her son M. M. had informed his mother that M.M. was in danger of not graduating from the Board's high school in June 1984. Mrs. P. testified that she went to Dr. Reeves' (principal) office and discovered that M.M. needed more credits in order to graduate in June 1984. She testified that Dr. Reeves told her to have M.M. come to the school during the Easter break where Dr. Reeves would assign M.M. to do work around the school and M.M. would thereafter graduate. Mrs. P. asserted that M.M. appeared at the high school as directed by Dr. Reeves and that M.M. did graduate from the Board's high school in June 1984.

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Dr. Reeves did not testify concerning Charge No. Nine.

Respondent testified that it was she who informed Mrs. P. that her son, M.M. was in jeopardy of not graduating in June 1984, because he had failed English and had not taken the course in summer school. Respondent was not invited nor did she attend the meeting with M.M., Mrs. P. and Dr. Reeves. Subsequent to the meeting with Mrs. P., Dr. Reeves informed respondent that M.M. was assigned to perform some public service work over the Easter vacation period and that M.M. was to be placed on the graduation list upon the completion of the public service work. Respondent testified that she recommended that M.M. not graduate because he was deficient in English. Respondent testified that she played no role in Dr. Reeves decision to permit and allow M.M. to graduate.

FINDINGS AND CONCLUSIONS

Based upon the unrebutted testimony, I **FIND** that it was Dr. Reeves, rather than respondent, who allowed and permitted pupil M.M. to graduate from the Board's high school in June 1984 despite the fact that pupil M.M. was deficient in English.

I **CONCLUDE**, therefore, that there is no basis in fact to sustain Charge No. Nine and that the Board has failed in its proofs. I further **CONCLUDE** that Charge No. Nine is hereby **DISMISSED**.

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CHARGE NO. 13

S. Gerald Craven testified that a controversy arose between himself and respondent in the 1984-85 school year where respondent did not adhere to the established lunch schedule. Craven asserted that respondent would work through her normal lunch period and take her lunch break at a time later than the time she was scheduled. Craven testified he had scheduled the lunch period for the guidance counselors in order to provide coverage to the guidance department during lunch. Craven asserted that the exception was made when a pupil or parent needed to see a counselor at the lunch period. He contended that respondent was the most frequent offender to the lunch schedule.

Kathlene Elizabeth Henry, guidance office secretary, testified, among other things that she would have lunch with respondent perhaps once per month. Ms. Henry testified that respondent would sometimes have her lunch in her office and not leave the guidance office area. The lunch period was scheduled into three segments and would vary between 5 and 10 minutes when one worked over the lunch period.

Barbara Savage, a former guidance counselor at the high school, testified that in the school year 1985-86 she had lunch with respondent between 85% and 90% of the time. She and respondent took their lunch either in the school's cafeteria or ate in the guidance office conference room. They would leave the building occasionally to have lunch with a group of colleagues. Ms. Savage asserted that respondent maintained her lunch schedule.

Respondent testified that it was her standard procedure to inform Craven when she could not eat lunch at her scheduled time. On one occasion, with the principal's permission, respondent ate her lunch later than her regularly scheduled time. Craven criticized and chastised respondent for changing her lunch schedule without Craven's permission. The principal thereafter explained to Craven that he had, in fact, given respondent permission to change her schedule.

FINDINGS AND CONCLUSIONS

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The testimony of Ms. Henry, Ms. Savage and respondent is found to be credible. I **FIND**, therefore, that the Board has failed to demonstrate that respondent had been " xxx insubordinate and in direct defiance of directives given to her by supervisor and supervisors xxx."

I accordingly **CONCLUDE** that Charge No. Thirteen be and is hereby **DISMISSED**.

CHARGE NO. 14

Charge No. Fourteen alleges that respondent " ...falsified certain documents concerning school related activities for the purpose of defrauding the Internal Revenue Service of the United States Government." The Board's major point of contention relates to Exhibit P36-B in evidence and the testimony with respect thereto.

Respondent testified that on or about September 11, 1986, she sent to Melvin Athelston Clarke, the Board's Director Special Services, by way of inter-school mail, a request for information and verification concerning her employment as a teacher of home instruction. Respondent asserted in her memorandum to Clarke that the information was needed for the United States Internal Revenue Service (IRS) (P-41). Mr. Clarke testified, among other things, that he did not receive P-41 in September but, rather, he was in receipt of a form letter from the IRS with a handwritten note (P-36A) seeking more information concerning a statement Clarke was purported to have written to respondent (P-36B). Exhibit P-36B is set forth below as follows:

PLEASANTVILLE HIGH SCHOOL

Franklin Boulevard
Pleasantville, N.J. 08232
(609) 645-3990

Joseph T. Fisher
Principal
Ext. 220

TO: Mrs. Pamela Cooper, Guidance Counselor
FROM: Melvin A. Clarke, Special Services Director
SUBJECT: Verification of Home Instruction
DATE: October 15, 1986

Per your request, as per the directive of the New Jersey Department of Education, it is required that we have on file

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the names of home tutors for each academic year. The year you are seeking verification is 1984:

> Our records indicate that you were the home tutor of [P.M.]. Your tutoring consisted of hospital tutoring (Cooper Hospital, Camden). Your request referenced transportation. To clarify the concerns of your audit, our Department pays the tutors fee for tutoring, not for transportation to and from the child.
>
> Your situation was unique, in that, [P.M.] was a child in the hospital and not at home. Should you need additional information, feel free to ask.

Sincerely,

[signed] M.A. Clarke

M. Athelston Clarke, Director
Department of Special Services

cc File (P-36B)

Mr. Clarke testified that the two documents, the IRS form letter (P-36A) and the letter addressed to respondent purportedly from him (P-36B) were received by his office through the inter-school mail. The documents did not come directly to Clarke but, rather, from the high school (P-36C).

Mr. Clarke testified extensively that he neither wrote P-36B nor sent it to the IRS. He asserted that the style and content of P-36B was not his. The Pleasantville High School letterhead on the letter purportedly sent to respondent (P-36B) is not the letterhead used by Clarke, as evidenced by P-37. Mr. Clarke asserted that he has never used his name as "Melvin A. Clarke" as it appears on the heading on P-36B. Rather, he refers to himself, professionally, by the name of 'M. Athelston Clarke." It is also observed by Mr. Clarke that the signature on the document is not his and it also lacks the "e" at the end of the spelling of his last name (P-36B). Mr. Clarke testified that he returns copies of all letters and memoranda he transmits and that there is no copy of P-36B in his files. Clarke asserted that he made inquiry of all the secretaries in his department and none had written or typed P-36B.

When Clarke realized he had not written P-36B, he commenced an investigation by contacting personnel at Cooper Hospital about pupil P.M. His investigation revealed, among other things, that the dates on P-36B were in error

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with respect to pupil P.M. As a consequence, Clarke wrote to Ms. Patricia Capitano, IRS District Director as follows:

Dear Ms. Capitano,

Per section 7602 of the Internal Revenue Code, I am submitting to you the information requested.

1. School Records: (Child Study Team Home Instruction Register)

According to the official register for students on home instruction, the student in question, ID# 8606850, was on home instruction as listed:

1983-84 started 3/20/84 ended 6/13/84 - Mrs. Pam Cooper, Tutor.
1984-85 started 12/07/84 ended 6/18/85 - Mrs. Pam Cooper, Tutor.
1985-86 started 9/05/85 ended 9/13/85 - Mrs. Pam Cooper, Tutor.

Student deceased: September 28, 1985.

2. Cooper Hospital, Camden (Medical Records)

Contact Person: Ms. Williams - 342-2000

(a) All admissions were during the 1985 school year. Ms. Williams found no other entries. She did not have him listed as passing away at the Cooper Hospital.

Admissions (Cooper Hospital): entered	1/16/85	discharged	1/25/85
"	2/05/85	"	2/12/85
"	3/19/85	"	4/01/85
"	7/16/85	"	7/19/85
"	9/13/85	"	9/25/85

Per your specific request, we have no information on the student being in Cooper Hospital during fiscal year 1984. Additionally, I have no information on the tutor being paid for travel expenses. To the best of my knowledge, he was tutored at home.

Please carefully consider the following:

1. You requested this information per an attached memo. Please be advised that this memo was not written by me and does not bear my true signature. I am also sending to you, a notorized statement to that effect.

2. We do not as a rule pay for the tutor's transportation.

Our school does reimburse employees for the use of their cars for authorized use only. The current rate is the same as the IRS'. I personally know of no situation where a home instructor was (or is) paid for transportation. This is usually done after working hours on

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the tutor's time. The tutor is paid by the hour for actual instruction time; usually five (5) hours per week. We do have on file the payment sheets submitted by Ms. Cooper.

I do hope that this clarifies this matter to your satisfaction. I deeply regret the misuse of my office and name. The school authorities have been notified and is investigating this matter. If you have any further questions, I can be reached at 645-3990 extension 273.

Respectfully,

[signed]

M. Athelston Clarke
Director of Special Services (P-37)

On the same date, October 27, 1986, Clarke forwarded a courtesy copy of P-37 to Superintendent Garrity and respondent. Clarke also sent a memorandum to Mr. Garrity, advising the Superintendent of the events and actions Clarke had taken with respect to his investigations (P-38). Therein Clarke advised the Superintendent to note, in P-38, among other things, that with respect to P-36B:

1. The style of writing differs from what I would normally write.

2. It was not typed by Ms. Peggy Ford. All of my typing is done by her (in rare instances, by Ms. Regina Whaley and Christina Marshall). No secretary's initials appear at the bottom of the page.

3. The stationary used is the high school's. I have my own and it is distinctly different. I have no access to the high school's stationary.

I am willing to submit to any questions, test etc. and will fully cooperate with any investigation. I am trusting that you will give this matter your immediate attention. (P-38).

Mr. Clarke forwarded courtesy copies to Ms. Capitano of the IRS and respondent (P-38).

On the same date, October 27, 1986, Clarke sent a memorandum to respondent, which reads in toto, as follows:

MEMO

TO: Ms. Pamela Cooper/Guidance Counselor

FROM: M. Athelston Clarke/Director of Special Services [signed]
M.A. Clarke

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DATE: October 27, 1986

RE: Internal Revenue Service request for information regarding student ID# 8606850, under the authority of Section 7602 of the Internal Revenue Code

Be advised of my receipt of the Internal Revenue Service's request per code for information regarding the dates of confinement of the above identified student in Cooper Hospital, Camden during 1984.

Attached to the request is an original memo dated October 15, 1986 "From Melvin A. Clarke, Special Services Director" to you regarding verification of home instruction.

Please note the following:

1. The above referenced memo was not written by me. I authorized no such verification memo. No request for such verification was ever made to me.

2. The memo does not bear my true signature. It was not typed on my letterhead or by my secretary.

3. I had no knowledge of this entire situation before receipt of the IRS request on Thursday, October 23, 1986.

Special Concerns: 1) I would have provided the necessary documentation if it was requested. The official registers for this period are kept on file by the district and can be immediately accessed.

2) I have not, and will not, ever authorize anyone to write memos, letters, etc. for me, since I am quite capable of doing that for myself. The legal ramifications of this is astounding. It greatly disturbs me that someone wrote this memo as though it came from me.

3) I am sure that you can appreciate the very serious nature of this. For this reason, I am notifying the Acting Superintendent, Mr. John Garrity of this request and my concerns.

Be advised that I am forwarding to the IRS the information requested as required by law. Do let me know if I can be of further assistance.

MAC/pf

cc: Mr. John F. Garrity/Acting Superintendent of Schools (P-39)
Ms. Capitano, Internal Revenue Service
Personal File

Respondent submitted her response to Clarke's memorandum (P-39) by way of memorandum dated October 28, 1986 (P-40) which included a copy of P-41. Respondent's memorandum states as follows:

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October 28, 1986

TO: Mr. Clarke, Director of Special Services

FROM : Mrs. Cooper, Guidance Counselor [initialed] P.C.

SUBJECT: I.R.S. Request for information

I am in receipt of your memorandum of October 27, 1986. Mel, attached is a copy of the request I sent to the office, in a sealed envelope marked confidential. After you came back on staff in October, I received a sealed memorandum to me from you with the information I requested and some that I did not with appeared to be your signature. I assumed this memorandum in response came from you and sent the entire thing to Mrs. Capitano.

As you stated, the information Mrs. Capitano is seeking is a matter of record. It is a matter of fact that the IRS seek verification and clarification of all materials sent to them. Therefore, knowing that, if I had known it did not come from you as I asked, then you know I would have shown it to you upon one of your visits to our building.

I sent the official request for official verification. I did not expect to be sent something from someone other than you. The information provided to the IRS by you is sufficient for what we have originally requested. However, the matter that I received a sealed response, via interoffice mail, was taken as a true response.

I do resent the tones that I have performed something wrong. As you, I do intend to follow the law. Therefore, I am glad you supplied me with copies of the entire situation. My attorney will clarify this matter. Your special concerns are true and I have the same, especially since it places me in a negative light. I am only in receipt of the material, not the sender and receiver.

However, the misuse of you office occurred and with me at the end, I also regret that. However, the fact still remains that this is another attempt to extend an already on-going set-up.

cc Mrs. Capitano
Attorney Cohen
File (P-40)

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This document was date stamped as received October 29, 1986 with a handwritten note "2:30 p.m. received 10/29/86, Peggy Ford, Secretary" (P-40).

On the subsequent day, October 29, 1986, Clarke sent respondent a letter wherein he stated as follows:

October 29, 1986

Guidance Department
Pleasantville High School
Pleasantville, New Jersey 08232

Dear Pam,

I today received your request for information dated September 11, 1986: (This is the first time I saw this), and your response dated October 28, 1986 to these memos/copies of materials you received from me. I have read your explanations. Please note the following:

1) Be assured that I am not involved in any attempt to frame you or to be a part of any "on going set-up". You know that in spite of all that has happened I remained loyal to you. I have always believed that persons are not guilty by allegations, but by proven fact.

2) I deeply regret that this has occurred. It will do neither you nor me any good. This is the last thing that I would want to deal with only after being in this position for less than a month. It is insane.

My personal desires are that:

1) The IRS fully understands that I did not verify the information provided to them on October 15, 1986. I did not type the memo and send it to you.

2) This situation be resolved.

As before stated, if I can be of any assistance do let me know. I did not suggest that you wrote the memo. In my memo to Mr. John Garrity, I stated that "I am deeply distressed that an employee (I am assuming), would concoct this type of document." The fact that it was written on Pleasantville High School letterhead, suggests that some school related person wrote this one. Do re-read what I have written. I have been extremely careful not to accuse anyone. I can however point out, that it was not written by me. That is a matter of fact.

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I hope that this entire incident can be put to rest soon. Let me know if I can be of further assistance.

Sincerely,

[signed] M.A. Clarke

Mel (P-42)

Mr. Clarke testified that he commenced working with the Board in 1978, the same year as respondent. He left the Board's school district on or about February 1, 1986 for employment with the Pineland's Regional High School District in Tuckerton, New Jersey, as a Learning Disabilities Teacher-Consultant (LDT-C). He returned to the Board's school district in or about September 30, 1986, to assume the position of Director of Special Services.

Mr. Clarke testified, among other things, that he had worked closely with respondent over the years and that she could address him as "Mel." Respondent also knew that Clarke always signed his memoranda and letters as "M. Athelston Clarke." Clarke asserted that respondent never referred to him as "Melvin A. Clarke." He testified that he does not claim that respondent wrote P-36B, which he also stated in P-42. Clarke knew that respondent was aware that he, Clarke, spelled his name with an "e" at the end.

Mr. Clarke testified that respondent did not deny that she sent P-36B to the IRS, however, respondent never stated that she wrote the document. In fact, respondent denied she wrote the document P-36B and Clarke has no idea as to who authored the document. Clarke conceded there were no security measures within the school district with respect to its inter-school mail.

Respondent testified, among other things, that she and her husband had ordinarily prepared their own tax returns and had been contacted by Ms. Capitano of the IRS in the Spring of 1986 with respect to respondent's tutoring of pupil P.M. [5]

---

5. Note - The Certified transcript of the proceedings refers to pupil P.M. incorrectly as F.M.

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Respondent declared that it was not a new experience for her to be contacted by the IRS inasmuch as she and her husband had been subject to IRS audits every year since 1979. She asserted there were times respondent and her husband owed additional taxes, however, never over $1,000. On other occasions, the United States Government owed respondent between $2,000 and $4,000 for overpayment on their taxes.

Respondent asserted that Ms. Capitano asked respondent for information concerning business expenses and itemized deductions, separate and apart from information concerning pupil P.M. Respondent provided the IRS with the information. The pupil tutorial information sought by the IRS was not concerned with P.M. only, but, rather, three pupils with whom respondent had been involved. Ms. Capitano sought verification that respondent's tutoring transportation was not reimbursed.

Respondent testified that in August 1986, prior to her sending Mr. Clarke P-41, she spoke with Clarke about the needed information. Thereafter, on September 11, 1986, respondent sent P-41 to Clarke, through the interschool mail marked "confidential", and asked him to supply the needed information. Subsequently, respondent received P-36B through the interschool mail, assuming it to be from Clarke. Respondent did not read the letter carefully and placed it back into the original envelope that had been sent to her and forwarded the envelope and P-36B to the IRS.

At the time respondent sent P-36B to Ms. Capitano, respondent was unaware that the signature on the document was a forgery. Respondent subsequently learned from Clarke that there was a problem with P-36B which resulted in the correspondence which is now reproduced supra (P-37, P-38, P-39, P-40, P-41, P-42).

Respondent testified she did not forge Clarke's signature nor did she request, direct or in anyway authorize anyone to forge his signature on P-36B. Respondent

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asserted further, that she was not responsible for the generation of P-36B in any manner.

Respondent's testimony with respect to her denial of the forgery of Clarke's signature is supported by Renee C. Martin, an expert in the field of document examination (R-9, R-10a, R-10b, R-10c).

FINDINGS AND CONCLUSIONS

The Board has put on a circumstantial case which it implores this tribunal to infer and find that respondent had committed an act and "falsified certain document concerning school related activities for the purpose of defrauding the Internal Revenue Service of the United States Government." The credible evidence does not support the Board's charge notwithstanding that the evidence clearly demonstrates the existence of a forged document which was used by respondent subsequent to its execution (P-36B). The unrebutted evidence does show that respondent did not forge Clarke's name on the document P-36B in evidence. The evidence also shows that security is totally lacking with respect to interschool mail. Respondent's memorandum of September 11, 1986 addressed to Mel Clarke and Marked "confidential" (P-41) could have been intercepted by anyone in the high school. I **FIND**, therefore, that the Board has failed to prove, by a preponderance of the credible evidence, that respondent executed P-36B in evidence.

I **CONCLUDE**, accordingly, that because the Board has failed to prove the truth of Charge No. Fourteen, it is hereby **DISMISSED**.

FURTHER FINDINGS OF FACT

It is observed here that the guidance department lacked proper supervision and oversight during the brief employment of Superintendent Weaver. It is also observed by this tribunal that Ellen M. Cohen, guidance office secretary from April 1983 to April 1985, testified that it was she who initially raised the charges with the

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Board against respondent. Ms. Cohen testified on this record that she had stated to representatives of the Board that respondent "had an N.A.A.C.P. mentality."

Ms. Cohen admitted on the record that she removed facsimiles of pupil confidential records from the school district without authorization. She asserted that she made unauthorized copies of pupil confidential records in the guidance department after normal school and working hours. Some of these confidential pupil records were transmitted by Ms. Cohen to the Absecon Board of Education without approval or authorization. Ms. Cohen also testified that she placed comments on pupil records without proper authorization (P-25).

The record also demonstrates that Ms. Cohen threatened respondent by way of a typewritten grievance with a handwritten note attached which stated:

> Pam,
>
> This letter hasn't gone to anybody else and it won't, if we can work things out together. I would like to have a response of some sort before Wednesday, April 17th.
>
> Ellen (R-5A)

Ms. Cohen admitted that she used the guidance department computer, without authorization, over the Easter (1985) vacation to compose her 5 page, 9 point grievance to respondent (R-5B). Respondent answered Cohen's grievance or "areas of concern" (R-5B).

Former principal George Reeves testified, among other things, that Ellen Cohen had verbally complained to him about guidance counselors mistakes. Reeves was of the opinion that Cohen's complaints about respondent were racially motivated.

Given these circumstances, I **FIND** that:

1. Commencing with the 1983-84 school year, the Board's guidance department lacked adequate supervision.

2. During the period of Ellen Cohen's employment by the Board as a secretary to the Director of Guidance, from April 1983 to June 1985, there

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were inadequate and insufficient safeguards to protect the confidentiality of pupil records in the high school department. N.J.A.C. 6:3-2.4.

3. Ellen Cohen violated the provisions of N.J.A.C. 6:3-2.1 et seq. when she copied pupil records, without proper authorization, and transmitted those copies to members of the Pleasantville and Absecon Board's of Education.

4. Ellen Cohen placed comments on pupil records without any authorization to do so.

5. The herein record demonstrates that while Ellen Cohen served as secretary to the Director of Guidance, there were documents missing from pupil files, unsigned letters inserted into pupil files, white-outs (erasures) and cross-outs, and pupil files that were incomplete; all of which could not be explained nor accounted for.

6. Ellen Cohen was biased against respondent declaring that respondent"...had an N.A.A.C.P. mentality."

7. Ellen Cohen's complaints against respondent to Mr. Craven and her grievance about respondent were racially motivated as attested to by Mr. Reeves.

Based upon these facts, I **CONCLUDE** that those charges brought by the Board against respondent concerning pupil records, files and papers are tainted by virtue of Ellen Cohen's conduct and admitted behavior. These facts further support respondent's claim, and I so **CONCLUDE** that the Board's charges lack merit and are, therefore, **DISMISSED**.

SUMMARY CONCLUSIONS

The Board has failed to carry its burden of proof, by a preponderance of the reliable and credible evidence, that any of the charges, except Charge No. Five, are true in fact. While Charge No. Five shows that respondent misinformed the parents of pupil A.J. regarding A.J.'s course credits together with the courses taken by the

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pupil, this misinformation was corrected on the same document supplied to the parent by respondent (P-16). This act of supplying misinformation to A.J.'s parents by respondent is a serious error in judgment or computation and one which is not to be condoned. However, it is not so serious as to give rise to a tenure charge of conduct unbecoming a teaching staff member. At most, a letter of reprimand to be placed in respondent's personnel file would be the appropriate disciplinary action for such an action.

Having carefully reviewed and considered all of the testimony and other evidence, I **CONCLUDE** that the herein charges alleged against respondent were not brought in good faith. This conclusion is based, in major part, upon the testimony of Board employees John F. Garrity, S. Gerald Craven and Ellen Cohen, all of which is summarized hereinbefore.

I **CONCLUDE**, therefore, that the Board has failed to support and sustain its charges against respondent, except to Charge No. Five; and that Charge No. Five is not sufficient grounds to warrant her dismissal or a reduction of her salary.

The Commissioner has consistently held that he "...is assiduous to protect school personnel in their employment when they are subjected to unfair or improper attacks..." *In the Matter of the Tenure Hearing of Joseph A. Maratea, Township of Riverside, Burlington County*, 1966 S.L.D. 77 at 106. Here, respondent needs the Commissioner's protection for unfair and unjust attacks upon her professional reputation.

ORDER

Accordingly, it is hereby **ORDERED** that the Board of Education of the City of Pleasantville immediately reinstate respondent to her tenured employment position as a guidance counselor in its high school. The Board is hereby **ORDERED** to restore to respondent the salary which was withheld from her during the period of suspension, subject only to mitigation, and all emoluments and benefits to which she is due. It is further **ORDERED** that respondent be placed on the appropriate step of the Board's salary guide without the loss of any annual increment to which she was entitled.

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It is finally **ORDERED** that the tenure charges against respondent be and is hereby **DISMISSED WITH PREJUDICE**.

This recommended decision may be adopted, modified or rejected by **SAUL COOPERMAN, COMMISSIONER, DEPARTMENT OF EDUCATION**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

16 May 1988
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

5/20/88
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 20 1988
DATE

OFFICE OF ADMINISTRATIVE LAW

dho

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IN THE MATTER OF THE TENURE	:	
HEARING OF PAMELA COOPER, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF	:	DECISION
PLEASANTVILLE, ATLANTIC COUNTY.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The parties' exceptions were timely filed pursuant to N.J.A.C. 1:1-18.4.

The Board argues that the ALJ failed to appreciate the issues involving the responsibility respondent had for the academic records of students for whom she was guidance counselor. It avers that her job description, P-2, and the testimony of various witnesses indicate that she had primary day-to-day responsibility for the custodialship, maintenance and accuracy of her students' records, the nexus of such information being that she was negligent in carrying out her responsibilities to such records.

The Board also contends that throughout respondent's testimony she refers to documents she alleges were part of a student's record while she had the file but which were missing at hearing. Moreover, it avers that (1) the ALJ makes references throughout his decision to documents which respondent indicated would be helpful to her case but which were missing from the student files at the hearing and (2) the ALJ failed to appreciate that respondent had full control and access to those files up until they were taken from her by the superintendent.

Further, the Board alleges the ALJ appeared to rely heavily upon his perception of Ellen Cohen, the guidance secretary, as "a prime mover" in the matter in reaching his conclusions with respect to the tenure charges herein. As to this it avers:

> ***The record shows that with the exception of those matters in which Ellen Cohen had some direct knowledge of the actions of the Respondent, she played no part in the decisions made by the Board with regard to these Charges and at the time that many of the complained of events occurred, Ms. Cohen was not an employee of the district. The ALJ appears to rely upon a conspiratorial theory, wherein the various administrators and employees of Petitioner are in concert to discredit the Respondent which theory has no basis, in fact or in the record, except from the self-serving made by the Respondent during her testimony.
>
> (Board's Exceptions, at pp. 2-3)

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As to Charge No. 1, the Board disputes the ALJ's statement in the initial decision, ante, that respondent asserted she did not recommend to the principal that S.M.K. receive a high school diploma, averring instead that such statement is contradictory to her testimony which admits to the sending of the disputed letter (P-4), but not to a transcript being attached. Moreover, the Board maintains that while the principal did not specifically recall a meeting with S.M.K. and her parents, he was very specific in his testimony that he relied upon information and direction received from respondent in certifying S.M.K. for graduation.

Regarding Charge No. 2, the Board alleges the ALJ missed the fact that respondent built her testimony and evidence upon the idea that D.M. was a new student in the school district when in fact the record shows he was a returning student and should not have therefore been treated as a new student. As to this, it states:

> ***DM had a prior record in the district with regard to his having fallen below the minimum standards in standardized tests prior to entering the high school. There is no evidence in the records of the student or in the testimony that the student ever passed the Minimum Basic Skills Test prior to the misplacement complained of in the Petition, except for the self-serving testimony of the Respondent that she, in fact, give (sic) DM a practice test which he passed and she thereupon placed him in courses which did not include remedial instruction. No independent evidence was produced at the hearing which would tend to show that DM was, in fact, given such a practice test. (Id., at p. 5)

As to Charge No. 4, the Board excepts to the ALJ's assertion at page 11 of the initial decision that Richard Mower was assigned responsibility to supervise and oversee the guidance department, averring not only that he never had such responsibility but also that the evidence and testimony do not support such an assertion.

As to Charge No. 7, the Board contends the ALJ ignored (1) the fact that the respondent had the responsibility for keeping A.J.'s records and (2) the testimony of Evelyn DeLaurentis and Mr. Strickler with respect to the normal procedures for grades being placed on the cards which later become a student's permanent record, i.e., they are sent to the counselor blank and received back with the grades placed upon them. Thus, it maintains, the record is clear that grades do not go directly from the teachers to Ms. DeLaurentis but from the teachers through the guidance counselor. Finally, it argues that although A.J. was a special education student, it was respondent who had responsibility for her records whereas Mr. Thomas and his department had responsibility for which courses she was actually to take and did take.

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Regarding Charge No. 14, the Board contends the ALJ's facts and conclusions ignore its position that she "falsified certain documents" with falsify being (1) analogous to N.J.S.A. 2C:21-1a(2) and 2C:21-4a and (2) as defined by Webster's New World Dictionary, 1964, as "to misrepresent; give an untrue account of; to utter (a record fraudulently)." As to this, it avers, inter alia, that:

> The ALJ's decision appears to rely upon the notion that in order for the documents presented by Respondent to IRS to be considered falsified, they would have to be actually signed by the Respondent. It is the Petitioner's position that the Respondent's transgression was in the presentation to IRS of documents which she knew, or should have known, were, in fact, incorrect and false in the representations that those documents made to the Internal Revenue Service and that those documents were offered to the Internal Revenue Service in an effort by the Respondent to mislead the Internal Revenue Service and to misinform. (Id., at pp. 7-8)

The Board then goes on to highlight what circumstantial evidence it believes leads to the logical conclusion that respondent is guilty of falsifying documents to the IRS. It states among other things that:

> Respondent in her testimony indicated that she advised Melvin Clark[e] with regard to the information she required for a response to Internal Revenue Service, by way of P-41. The record indicates that the Respondent indicates that she was required to provide certain information with regard to her tutoring of a student, PM, while he was in the hospital. Mr. Clark[e] testified that he never received P-41, which testimony was never refuted in the record. It should be noted that the information contained in P-36B, especially with regard to the specific hospital and location of the tutoring in Camden is not reflecting (sic) in the request set forth in P-41.
>
> Respondent implied in her testimony as is implied in the ALJ's decision, that some unknown person could perhaps have intercepted P-41 and used P-41 to prepare P-36B. P-36B contains the false information that the Respondent tutored a student, PM, while he was a patient in Cooper Hospital in Camden, N.J. during 1984. Unrefuted testimony and documentary evidence indicates that, in fact, PM, was not a patient in Cooper Hospital during 1984.

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> If the Respondent's testimony regarding the origins and purpose for P-41 is accepted then the relationship between P-41 which is the method by which Respondent says she advised Mr. Clark (sic) of the required information, and P-36B which the Respondent subsequently accepted as the response to P-41 and which was submitted to IRS, must be examined. A review of P-41 contains no reference to Cooper Hospital nor does P-41 indicate a specific year for which information is sought. While on the other hand, P-36B reflects the hospital about which IRS was inquiring as well as a specific year, 1984, about which IRS was inquiring. Anyone who intercepted P-41 would not be able to respond with P-36B (which is directly responsive to the inquiries by IRS) based simply upon the requested information in P-41.
>
> (Id., at pp. 8-9)

Respondent's exceptions request that the Commissioner award pre-judgment interest on the basis that the Board's charges were brought in bad faith, were racially motivated and constituted an "unfair and unjust attack upon her professional reputation." (Respondent's Exceptions, at p. 1) Relying on Bd. of Ed. of the City of Newark v. Levitt, 197 N.J. Super. 239, 245 (App. Div. 1984), respondent pleads that there are compelling circumstances in this case to award pre-judgment interest, averring that:

> As Judge Law stated, the Board's charges against Respondent "were not brought in good faith." Initial Decision at 37. In fact, as indicated by Judge Law, the filing of the charges against Respondent, by Ellen Cohen, was "racially motivated." Initial Decision at 34-36. Indeed, racial motivation tainted this entire case. See, Initial Decision at 13, 25-26. As Judge Law found, members of the Board's administration were aware that Cohen's charges against Respondent were racially motivated, yet they perpetuated the discrimination by allowing these tainted charges to go forward.
>
> Furthermore, and of great significance, Judge Law found that Respondent has been subjected to an unfair and unjust attack upon her professional reputation. Initial Decision at 37.
>
> The foregoing findings of Judge Law clearly constitute "overriding and compelling equitable reasons" warranting an award of pre-judgment interest. If ever a case cried out for such a remedy, it is this one.

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> Respondent was unable to work as a guidance counsellor during the period of her suspension, not because of wrongdoing on her part, but as a direct result of wrongdoing by the Board and its agents. Accordingly, Judge Law's recommended remedy should be adopted by the Commissioner of Education with the inclusion of pre-judgment interest. (Respondent's Exceptions, at p. 2)

Moreover, respondent rebuts each of the Board's exceptions. First, by pointing out that the ALJ's findings and conclusions rest upon credibility determinations in favor of respondent and, as the record clearly supports those findings, great deference must be given to his determinations.

Respondent counters the Board's criticisms of the ALJ by averring it ignores the fact the records were physically changed by Ellen Cohen through unauthorized alterations and other such mishandling of the records. (Initial Decision, ante) She likewise points to the Director of Guidance's (Craven) admission of tampering with the records (5T-95-96, 100-101). She questions how, based on such findings by the ALJ, the Board can argue that their student records were secure enough to attribute fault to her.

Moreover, respondent agrees with the ALJ's conclusion that Ellen Cohen was "a prime mover" in this case as it was she who lodged the most severe accusations with the district's administration and urges that

> ***Cohen's admitted tampering with Respondent's guidance records, along with Cohen's other misdeeds, played a significant role in Petitioner's decision to pursue the tenure charges. Furthermore, it was Cohen's racially motivated actions to discredit Respondent which resulted in Respondent becoming a convenient "scapegoat" for the misdeeds and mismanagement of the guidance department; for example, Reeve's improper graduation of students and Craven's belated admission that it was he, not Respondent, who improperly changed student records. (Petitioner refers to this as Judge Law's "conspiratorial theory.") Lastly, it must be noted that Petitioner's statement that "at the time that many of the complained of events occurred, Ms. Cohen was not an employee of the district," is true only in regards to charge 14. Cohen was still an employee of Petitioner when all of the other charges were originally brought. (emphasis in text)
>
> (Respondent's Reply Exceptions, at pp. 2-3)

Respondent rebuts the Board's assertion that the ALJ failed to appreciate the fact that up until the files were taken from her

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by the then superintendent, she had full control and access to the student files, arguing that

> ***What Petitioner fails to mention, and what is clear from the record, is that these student files were removed from Respondent's possession almost one year before the hearing, and Garrity could not account for their whereabouts before he became Superintendent. (3T-90, line 6 to 91, line 24). In other words, Respondent did not have "control and access to the student's files" for a year prior to the hearing. In fact, it is not clear exactly who did have access to the files during that year-long period. (Id., at p. 3)

As to the Board's exceptions to the ALJ's determination with respect to Charge No. 1, respondent urges the Board has completely ignored S.M.K.'s own testimony about the meeting she and her mother had with the principal, Dr. Reeves, wherein he set the conditions for course completion (9T-47), as well as Dr. Reeves' own testimony on cross-examination that respondent had informed him prior to this meeting that S.M.K. was course deficient and, thus, not eligible to graduate (8T-33).

As to Charge No. 2, respondent contends that the Board's original position at hearing was that the procedure she used with D.M. in administering a practice MBS test was her own (4T-117-127) where now in its exceptions it admits the policy did exist (R-11 and R-12) and she is accused of not giving the test. She urges the Commissioner to rely upon the ALJ's credibility determination that she did administer the test, particularly in light of his further findings on pages 34-36 of the initial decision (the lack of adequate supervision in the guidance department commencing with the 1983-84 school year; the fact the Board's charges with respect to pupil records, files, and papers were tainted by Ellen Cohen's conduct and admitted behavior, etc.).

Respondent further contends that the Board's exception with respect to Charge No. 4 that Mr. Mower had no supervisory responsibility over the guidance department is belied by Exhibit R-11 and is of no moment anyway, if true, as it has no bearing on the ALJ's findings relative to that charge.

Respondent counters the Board's exceptions to Charge No. 7 by again pointing to the tampering of student records by Ellen Cohen and Craven, the ALJ's general finding on pages 35-36 of the initial decision as to the inadequate and insufficient safeguards to the confidentiality of such records (to which the Board does not except), averring that:

> ***Given this sorry state of record-keeping, it is little wonder that Judge Law concluded that Petitioner failed to establish, by a

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> preponderance of the credible evidence, that it was Respondent who affixed the misinformation to A.J.'s PRC. (emphasis added)
>
> (Initial Decision, ante)
> (Id., at p. 4)

Lastly, respondent strenuously attacks the Board's exceptions with respect to the falsification of documents charge, the arguments of which are incorporated herein by reference.

Upon a thorough independent review of the record in this matter including the parties' exceptions and the transcripts, the Commissioner is in agreement with the ALJ that the tenure charges be dismissed. The record clearly demonstrates that the Board has failed in its burden to demonstrate by a preponderance of the credible evidence incompetency and unbecoming conduct. The ALJ's findings and conclusions are well supported in the record and are adopted by the Commissioner. There is little question upon examination of the record that the ALJ is correct in concluding that the Board's charges lack merit, except for Charge No. 5 which was sustained but deemed not worthy of dismissal or reduction in salary. The taint brought to these proceedings by Ellen Cohen, who was unquestionably "a prime mover" behind the Board's charges, cannot be underestimated despite the Board's arguments otherwise. The ALJ's summation, ante, captures well the appalling mismanagement and breach of confidentiality of student records at Pleasantville High School, the poor supervision of the guidance department, and the racial bias/motivation of Cohen which taints the tenure charges in this matter.

Respondent is correct in asserting this matter is essentially one of credibility and, upon a comprehensive review of the record, the Commissioner must concur with the ALJ that the credibility of the Board's witnesses, in particular Garrity, Craven, and Reeves, cannot be accepted given (1) the pathetic security for, and management/supervision of, the entire student record process at the high school and (2) the appallingly slipshod approach to granting credit completion for a diploma and the changing of grades which is revealed by this record.

Further, upon review of the transcripts in this matter, the Commissioner finds nothing in the Board's exceptions to demonstrate that the ALJ erred in his findings and conclusions for any of the specific charges levied in this matter.

Accordingly, the tenure charges against respondent are dismissed with prejudice. Respondent's request for pre-judgment interest is denied as close scrutiny of all pleadings, post-hearing submissions to the ALJ and the two pre-hearing orders in this matter fails to reveal that the request for such relief was raised as an issue before the Commissioner prior to the filing of her exceptions.

COMMISSIONER OF EDUCATION

July 13, 1988

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6115-87
(EDU 8186-85 - Remanded)
(EDU 2698-85 - Remanded)
AGENCY DKT. NO. 92-4/85

IN THE MATTER OF THE TENURE HEARING OF JUDE MARTIN, SCHOOL DISTRICT OF THE TOWNSHIP OF UNION BEACH, MONMOUTH COUNTY

Louis E. Granata, Esq., for petitioner
(Yacker & Granata, attorneys)

Thomas W. Cavanagh, Jr., Esq., for respondent
(Chamlin, Schottland, Rosen, Cavanagh & Uliano, attorneys)

Record Closed: May 26, 1988 Decided: May 27, 1988

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

Procedural History

This is the second remand of a teacher tenure case for clarification of the record. In an initial decision (EDU 2698-85) issued on November 14, 1985, Administrative Law Judge Leon S. Wilson determined that respondent had engaged in unbecoming conduct and recommended imposition of a 150-day suspension without pay. However, on the then existing record the Commissioner of Education ("Commissioner") rejected Judge Wilson's penalty recommendation and remanded the matter to the Office of Administrative Law ("OAL") for psychiatric examination of the respondent and for further proofs on an appropriate penalty. Pursuant to Commissioner's order, the OAL held remand hearings on December 11 and 19, 1986. On July 24, 1987, I issued an initial decision (EDU 8186-85) making additional factual findings and adding a requirement that respondent participate in an alcohol treatment program as a condition of reinstatement to his teaching duties.

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By order dated September 2, 1987, the Commissioner remanded the case to the OAL a second time because of deficiencies in the sound recording of the hearing which had taken place on December 11, 1986. Specifically, the Commissioner stated:

> Consequently . . . this matter [must] be remanded to the Office of Administrative Law for the purpose of permitting these two witnesses to re-testify under direct and cross-examination as to the content of their written findings so that there is opportunity to create an accurate record for possible reference by the parties and/or the ALJ and ultimately to the Commissioner for his decision.

The two witnesses to which the Commissioner referred were Dr. Harry Brunt and Dr. Chester L. Trent. After receipt of the Commissioner's ruling, petitioner arranged for preparation of a transcript of the sound recording of the December 11, 1986 hearing. Review of that transcript reveals that the testimony of Dr. Trent is clear and understandable, but that there are gaps in the recorded testimony of Dr. Brunt.

On December 8, 1987, the OAL held a further hearing (EDU 6115-87) for the purpose of reconstructing the record. Petitioner promptly arranged for preparation of a transcript of the most recent hearing. Unfortunately, the court reporting service erroneously designated the transcript with the old docket number (EDU 8186-85) rather than the current docket number (EDU 6115-87). When the transcript arrived on February 22, 1986, the OAL staff mistakenly assumed that the transcript related to a closed case (EDU 8186-85) and forwarded the transcript to the Department of Education. As soon as the mistake was discovered, the OAL called for return of the transcript, which was received on May 25, 1988. The record closed on that date.

Findings of Fact

Nothing contained in the reconstructed record causes me to change the factual findings set forth in the initial decision (EDU 8186-85). Accordingly, I incorporate those findings as if set forth fully herein.

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Conclusions of Law

Nothing contained in the reconstructed record causes me to change my conclusions of law and order set forth in the initial decision (EDU 8186-85) issued on July 27, 1987. Accordingly, I incorporate those conclusions and order as if set forth fully herein.

Order

It is **ORDERED** that the following items comprising the reconstructed record be certified to the Commissioner for consideration in connection with his review of this matter:

1. Transcript of the hearing held on December 11, 1986.

2. Transcript of the hearing held on December 19, 1986.

3. Transcript of the hearing held on December 8, 1987.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby file this initial decision with **SAUL COOPERMAN** for consideration.

May 27, 1988
DATE

KEN R. SPRINGER, ALJ

Receipt Acknowledged:

May 31, 1988
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 2 1988
DATE

OFFICE OF ADMINISTRATIVE LAW

md/e

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IN THE MATTER OF THE TENURE	:	
HEARING OF JUDE MARTIN, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE BOROUGH OF	:	DECISION ON REMAND
UNION BEACH, MONMOUTH COUNTY.	:	
	:	

The record and initial decision on second remand rendered by the Office of Administrative Law have been reviewed. The Board and respondent filed timely exceptions pursuant to N.J.A.C. 1:1-18.4. Respondent also filed timely reply exceptions.

The Board first claims that in the ten months that have passed since the ALJ issued his initial decision on remand:

> [R]espondent has done nothing to indicate he has either voluntarily enrolled in [an acceptable alcohol treatment program] or made preparations to have such a program considered. This the Board suggests is a further indication of the careless "indifference of the respondent to authority, responsibility or concern he is expected to display as a teacher."
>
> (Board's Exceptions, at p. 3, quotation unidentified in original)

Further, the Board points out that since his suspension in February 1985, respondent has "neither sought nor obtained any employment other than a part time job he had while employed by the Board. He has done nothing to mitigate the $35,000.00 yearly salary paid by the Union Beach Board of Education since 1985." (Id.) The Board avers that even though the ALJ told him 18 months ago that "he had 'an obligation to seek employment elsewhere,' [h]e has done nothing." (Exceptions, at p. 4, quoting Tr., December 19, 1986, p. 93, lines 9-46) The Board contends that this conduct indicates "a careless indifference to the responsibility expected of a teacher." (Id.) The Board adds, "For all the reasons set forth above *** and for the reasons set forth in the exception filed by the Union Beach Board of Education on August 11, 1987 attached hereto as Exhibit B and refiled as part of the exception file in this Initial Decision, reinstatement of the teacher is not warranted." (Id., at p. 5)

The Commissioner notes for the record that said exceptions filed by the Board on August 11, 1987 were untimely and, thus, were not considered in his decision dated September 2, 1987. Accordingly, the Board's resubmission of said exceptions at this juncture of the proceedings is inappropriate and not incorporated in the Commissioner's Decision, which follows.

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In the current timely exceptions, the Board further takes exception to the ALJ's determination and Order dated October 8, 1987 directing the Board to pay all expenses for the transcripts of December 11, 1986 and any future hearings to be held in the matter. Reciting its version of the circumstances that led to the Commissioner's remand of September 2, 1987, the Board contends that the ALJ incorrectly concludes, relying on In re Morrison, 216 N.J. Super. 143, 160 (App. Div. 1987), that the Board should be responsible for these costs because it raised objections to the inadequacy of the existing record. The Board avers Morrison, supra, is distinguishable for the following reasons:

> There was no transcript here because a sound recording operated by the ALJ did not work. The Board disagreed with what the respondent's attorney['s] recollection of the testimony. It was the ALJ who arbitrarily decided the Respondent's recollection of testimony was accurate. Despite the lack of transcript the matter was referred to the Commissioner's office. On the remand both parties should be charged with the expense of the further proceedings. Neither party is chargeable for the lack of a stenographer at the original hearing.
>
> The reason no stenographer was present on December 11, 1986 was because the stenographers were on strike against the O.A.L. It was not until the date of hearing that either party knew no stenographer would be provided by the O.A.L. It was the ALJ's decision to proceed with an inadequate recording instrument rather than continue the hearing until a stenographer could be provided.
>
> Why then should the Board be charged with all the expenses? (Id., at pp. 5-6)

Respondent's extensive exceptions and reply exceptions to the initial decision on remand dated May 27, 1988 begin with a prologue of his version of the procedural stance of the matter to date. Therein, respondent contends that ALJ Springer's findings and conclusions relative to Dr. Trent's testimony remain as they were in the initial decision, and that there is no reasonable basis to alter such findings as a result of the remand and the process which was used. As to Dr. Brunt's testimony, and the results of what his counsel terms the reconstruction process, respondent contends in the Board's exceptions dated June 6, 1988 that

> not a single area is referenced therein, which is alleged by the Board to indicate a contradiction with the "Statement of Evidence" prepared by this office last March. By his own admission, counsel for the Board has conceded that the presentation of Dr. Brunt's testimony contained in the

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> "Statement of Evidence" previously submitted, has been proven to be totally accurate. ***(emphasis in text) (Respondent's Reply Exceptions, at p. 4)

Respondent avers that the Board's failure to identify "a solitary reference" that contrasted with the original statement of evidence submitted by respondent's counsel suggests that "the reliance on the 'Statement of Evidence' by counsel for the Petitioner in his brief, and Judge Springer in his decision, was well founded and totally acceptable." (Id.)

Respondent concurs with ALJ Wilson's conclusion and ALJ Springer's accord with his conclusion that dismissal from his tenured position is unwarranted in the instant matter. Moreover, as to the penalty phase of this case, respondent avers that the Commissioner

> has received three recommendations from two separate judges which have been consistent. despite the addition of various evidence through two remands. He must also acknowledge and give deference to three separate sets of findings and conclusions of two different law judges, who both had a first-hand opportunity to observe witnesses and evaluate their credibility. See In re Masiello, 25 N.J. 590, 606 (1958), and Quinlan v. Board of Education of North Bergen Township, 73 N.J. Super. 42, 50-54 (1962). (Id., at p. 8)

He submits the Administrative Procedure Act and the applicable regulations in the New Jersey Administrative Code require that the Commissioner sustain the recommendation of both ALJs that loss of tenure in this case is inappropriate.

As to the Board's exceptions, respondent finds it inappropriate, due to the limited nature of the most recent remand, for the Board to proffer commentary on respondent's employment status while on suspension or concerning whether he is currently enrolled in a program for alcoholism. "***The Board would have the Commissioner rely upon actions of the Respondent several years after the incident resulting in the charge in question, and penalize him for accepting a benefit bestowed upon him by statute." (emphasis in text) (Id., at p. 13)

Moreover, respondent submits that a review of the Board's exceptions

> will discern that there is not a single reference to any specific factual finding or conclusion of law of Judge Springer that is contested -- with the basis for that position set forth. No specific areas are suggested to be inaccurate or

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> inappropriate, despite the extensive record developed and the detailed factual findings made by Judge Springer.*** (emphasis in text)
> (Id., at p. 10)

Similarly, respondent argues there is no legal authority cited in the Board's exceptions on the substantive argument relative to an appropriate penalty. Respondent contends that by failing to respond to his arguments, the Board "is tacitly accepting the correctness of the Respondent's position.***" (Id., at p. 11)

Concerning payment for transcript costs, respondent posits the following:

> It is conceded *** that the Board raised an objection to the procedure set up to develop the "Statement of Evidence," because it "disagreed with" the recollection of Respondent's attorney regarding the testimony. (Page 6, letter. memorandum) It has been previously documented that the "Statement of Evidence" has been demonstrated to be accurate, and as previously set forth those conclusions are not even challenged at present by the Board. Since the Administrative Law Judge presented both attorneys with an equal opportunity to draw up a proposed evidentiary statement, and the Board Attorney chose to simply issue a narrow objection to the lengthy document drawn by Respondent's counsel, how can he now be heard to complain, particularly in light of the apparent correctness of the position he objected to? How can the Commissioner, in light of these circumstances, apportion the payment for the transcript costs necessitated by the protestations of the Board Attorney? (Id., at p. 14)

Respondent posits an exception to the ALJ's ruling disallowing into evidence a polygraph test he took concerning the areas of discussion between himself and the accusing party on the evening of the incident. Said exhibit, marked for identification as R-6, was not admitted based on the ALJ's ruling that strict consideration of the issue mandated the necessity of mutual consent before admission of the test. (See Tr., December 19, 1986, pp. 105-108.) While respondent does not take issue with the technical accuracy of the ALJ's ruling, it is submitted that "due to the unique development of this particular matter, the test should have been received into evidence, and the Commissioner allowed to determine the weight to be utilized in considering the results. (Respondent's Reply Exceptions, at p. 15) Respondent's arguments justifying the admissibility of this test into evidence are incorporated herein by reference.

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Finally, respondent avers that while on suspension the Board has paid him his salary and benefits pursuant to N.J.S.A. 18A:6-14 at the 1984-85 salary rate, but that he has not received any of the increments he would have been entitled to during 1985-86, 1986-87 and 1987-88. Respondent contends, "Since no separate actions were undertaken to deny Respondent his increments during this period, it is respectfully submitted that the Commissioner should now review this Order and make a determination regarding the appropriateness of that conclusion." (Id., at p. 18)

Respondent summarizes by stating:

> The exhaustive inquiry into this matter should be terminated at this point and the Respondent should be returned to the profession he practiced for 18 years. That conclusion, reached independently by two separate Administrative Law Judges, is the only logical and compelling conclusion which the evidence supports. The same result should ensue after a review by the Commissioner. (Id., at p. 20)

Upon his careful and independent review of the record, the Commissioner affirms the findings and determination of the Office of Administrative Law, as amplified herein, for the reasons that follow. Before reaching the merits of the matter, however, the procedural issues will first be addressed.

Initially, the Commissioner would clarify the record by stating that his expressed purpose in remanding the instant matter again was to expand the record to include from evidence and testimony relative to all of the circumstances surrounding the night in question, a psychiatric opinion as to whether respondent is fit to return to his duties in the classroom. It is not at question at this point whether respondent is guilty of conduct unbecoming. The Commissioner concurred with ALJ Wilson's determination that concerning the incident involving respondent and Mr. Leach that respondent's

> ***unwarranted intrusion upon the privacy of a perfect stranger, and his crude sexual suggestion despite plain rejection, clearly violated the standards of circumspection, reticence, modesty, self-control, good taste, mannered behavior, sensitivity and concern for others that the community rightly expects of its teachers.***
> (Initial Decision, ante)
> (Commissioner's Decision, at p. 19)

This finding was independently made, applying the Commissioner's standard of review of such matter following a de novo hearing at the Office of Administrative Law. It was not made in reliance upon a municipal court judge's earlier finding that Mr. Martin was guilty not of lewdness, but rather of harassment. In

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remanding the matter for further findings, it was the Commissioner's directive that further testimony and evidence be elicited concerning respondent's driving on the revoked list and his physical and mental stability in properly establishing the extent of respondent's unbecoming conduct and his fitness to resume teaching duties.

Moreover, in reviewing the transcripts and timely exceptions and replies, the Commissioner acknowledges the merit of respondent's argument that the Board's exceptions lack reference to specific areas in the record which it avers are inaccurate or inappropriate. In this regard the Commissioner finds the Court's conclusions in In re Morrison, 216 N.J. Super. 143 (App. Div. 1987) instructive. Therein, the Court stated:

> In the instant case Morrison was provided with a copy of the ALJ's initial decision and did file detailed exceptions. Pointing out such errors is meaningless, however, if the agency is unable to assess the merits of those exceptions absent a copy of the relevant portions of the transcript. Thus, a meaningful review necessitates that the agency be supplied timely with at least those parts of the transcript. It must then review those portions which relate to material issues which are raised by the exceptions.***(emphasis supplied) (at 157-158)

The Board's exceptions fall far short of the specificity and transcript citations required for meaningful agency review. Notwithstanding this shortcoming in the exceptions, the Commissioner's review of the three transcripts submitted after the second remand provides sufficient basis upon which to form his own conclusions concerning the testiony taken at hearing. Discussion of the merits of the instant matter follows below. Further discussion of the procedural aspect of the matter precedes such resolution, however.

Next, the Commissioner would clarify that in remanding this matter a second time to the Office of Administrative Law on September 2, 1987 he could not have been plainer in expressing his requirement that the hearing in this matter be reconvened in order to allow direct examination and cross-examination of the two expert witnesses by way of retestifying, which under normal OAL procedures involves either voice-activated taping of such proceedings or stenographic transcription. See, N.J.A.C. 1:1-14.1 and 1:1-14.11 Instead, the parties agreed to the following provision: "A transcript will be prepared from the amplified tapes of the OAL hearing conducted on December 11, 1986." (See Order dated October 8, 1987 issued by ALJ Ken Springer, OAL DKT. NO. EDU 6115-87, EDU 8186-85 Remanded, EDU 2698-85 Remanded.) Thereafter, upon receipt of such transcripts, the ALJ, counsel for the Board and counsel for respondent, along with Dr. Brunt, the psychiatrist whose original testimony was inaudible on tape, met, read from the

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by-then-transcribed hearing of December 11, 1986 and tried to piece together, by a process akin to fill-in-the-blank, what each had said on December 11, 1986. The Commissioner deems this unorthodox effort to be in contravention of his directive that there be testimony taken again, "as to the content of their written findings so that there is opportunity to create an accurate record***." See Commissioner's Decision, dated September 2, 1987, at p. 17.

However, inasmuch as the Board's exceptions do not raise substantive objection to the record in its current form, and having reviewed both transcripts of what now comprises the testimony of Dr. Brunt as taken on December 11, 1986, as well as the transcript of December 19, 1986, the Commissioner sees no basis for remanding the matter again in order to compel the parties and the ALJ to comply with his directives concerning the experts' testimony. Accordingly, and as noted above, the merits of the matter will be addressed in this decision at a later juncture.

With respect to who should pay for the transcripts which were produced in this matter, given the highly unusual circumstances and procedural flaws that have triggered this inquiry, the Commissioner believes an equitable resolution should not place responsibility for such cost solely upon the Board but rather should be shared between the parties.

As to the merits of the instant tenure charges, the Commissioner's directive on remand to provide a psychiatric evaluation specifically required a finding as to whether respondent's conduct on September 1, 1984 -- including both the interchanges between Mr. Lynch and Mr. Martin and driving on the revoked list -- "represents a momentary aberration from the normal behavior of a stable individual *** or psychiatric problems reflective of a disturbed personality unfit to return to his duties in the classroom." (Commissioner's Decision, dated December 20, 1985, at pp. 21-22) The reluctance of the psychiatrist agreed to by the parties to extend such a prognosis must be interpreted by the Commissioner as a tacit admission by Dr. Trent that the evidence of his psychiatric examination of respondent could not or did not provide sufficient basis to firmly establish a deviation from normal mental health that would preclude his fitness to resume teaching. That Dr. Brunt, respondent's expert witness, had no compunction in reaching the conclusion in his report that "it is my opinion that on the evening in question if such an act took place it was 'a momentary aberration from normal behavior of a stable individual and Mr. Martin's actions are not an indication of a more serious psychological or psychiatric problem that would render him unfit to perform his duties in a classroom.'" (Exhibit R-3, at p. 2) This exhibit supports the Commissioner's finding to resolve such ambiguity in respondent's favor. He does so given the fact that respondent has a recent unblemished driving record and also recognizing the total absence of any charge by the Board that the nature of the behavior averred in any way affected his 18 years' performance as a classroom teacher, wherein he has received satisfactory evaluations up through the time of his suspension. He

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affirms the ALJ's ruling, however, disallowing the admission into evidence of a polygraph test taken by respondent for the reasons expressed by the ALJ at hearing. See Tr., December 19, 1986, at pp. 96-108.

Notwithstanding the above conclusions, the Commissioner is gravely disturbed by respondent's apparent ability and tendency to rationalize what are very serious deviations from acceptable modes of behavior, albeit that such incidents occurred outside the school environment. The Commissioner finds unpersuasive respondent's flimsy justification and explanations as to why he twice in the course of two months' time was found to be driving while on the revoked list. The inference is noted that while "caught" twice, there might very well have been other occasions during the year of his suspension from driving when respondent felt justified in breaking the law in a similar fashion.

The Commissioner is also troubled by respondent's cavalier attitude, demonstrated in regard not only to his repeatedly violating the law by driving on the revoked list, but also concerning what both ALJ Springer and Dr. Trent recognize is a serious drinking problem. It is noted in the report of Dr. Trent that

> ***it is my opinion Mr. Martin has a definite problem with his control of his personal conduct which control is weakened by drinking and has been a problem of such extent so as to bring him to the attention of the authorities on at least two occasions. This warrants a psychiatric diagnosis of substance abuse, alcohol.
>
> ***It is to be noted from his own description of his driving record and his description of eating and drinking habits that a definite problem of behavioral control is present.
>
> (Exhibit C-1, at p. 7)

The Commissioner emphasizes that neither homosexuality, if demonstrated in the record, nor alcoholism, necessarily constitutes grounds for dismissal from a tenured position. Rather, whether such condition affects the individual's fitness to remain in the classroom governs the matter. See In the Matter of the Tenure Hearing of John Gish, School District of Paramus, 1980 S.L.D. 1229, 1258-59, St. Bd. aff'd/rev'd 1981 S.L.D. 1428, Super. Ct., App. Div. aff'd 1982 S.L.D. 1512. In the Gish case, the Commissioner stated:

> The issue to be determined herein by the discussion and determinations of the tenure charges filed and thoroughly investigated in sixteen days of hearing pivots not on respondent's personal life style but rather whether or not his self-avowed life style, whatever it may be, impacts on his fitness to

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> teach. In other cases, the Commissioner and the courts have previously so determined. Grossman, supra; Tordo, supra; Wolfe, supra.

Upholding Mr. Gish's right of free speech, the State Board dismissed all charges related to his advocacy of Gay Rights, but affirmed the Commissioner in dismissing Mr. Gish on the basis of Charge 13, relating solely to his possession of controlled dangerous substances, "which alone warrants his dismissal from the Paramus School System." (1981 S.L.D. at 1431)

In re Grossman, 127 N.J. Super. 13 (App. Div. 1974) establishes a two-step analysis for determining whether a teacher may return to his tenured teaching position after tenure charges are proved:

> We think it would be wrong to measure a teacher's fitness solely by his or her ability to perform the teaching function and to ignore the fact that the teacher's presence in the classroom might, nevertheless, pose a danger of harm to the students for a reason not related to academic proficiency. We are convinced that where, as has been found in this case, a teacher's presence in the classroom would create a potential for psychological harm to the students, the teacher is unable properly to fulfill his or her role and his or her incapacity has been established within the purview of the statute.*** (at 32)

In balancing the rights of respondent herein against the interests of the children with whom he would come in contact were he returned to the classroom, the Commissioner has considered "the nature and gravity of the offenses under all of the circumstances involved any evidence as to provocation, extenuation or aggravation, and *** any harm or injurious effect which the teacher's conduct may have had on the maintenance of discipline and the proper administration of the school system." In re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967) (1967 S.L.D. 201, 211) See also Schroeder v. Board of Ed. of the Twp. of Lakewood, 1960 S.L.D. 37, rev'd State Board of Education, 1961-62 S.L.D. 236; aff'd Super. Ct., App. Div., 240; Board of Education of the Bordentown Regional High School v. Paul H. Wells, 1982 S.L.D. 170, aff'd State Board 173; In the Matter of the Tenure Hearing of David Bernstein, Matawan Regional School District, 1967 S.L.D. 73.

Based upon the foregoing, the Commissioner finds and determines, in accord with ALJs Wilson and Springer, that respondent is guilty of conduct unbecoming a teaching staff member for the reasons stated in the Commissioner's decision dated December 20, 1985. However, in assessing an appropriate penalty, the Commissioner is convinced, as were the ALJs, that dismissal is not warranted in the instant matter for the reasons set forth in the initial decision rendered by ALJ Wilson, "including the non-criminal

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nature of Martin's conduct, the lack of deliberation or planning on his part, Martin's 'laudable' record of service in his profession, and the absence of harm to the administration of the Union Beach school system." (Initial Decision on Remand, dated July 24, 1987, at p. 9, summarizing Initial Decision dated November 14, 1985) In light of the further findings of ALJ Springer, especially that finding which states, "the record clearly demonstrates that Martin has a serious drinking problem," (Initial Decision on Remand, dated July 24, 1987, at p. 7), the Commissioner hereby directs that Respondent Jude Martin shall be forthwith restored to his former position, but that he shall, as sanction for the offense proven, forfeit salary and other compensation withheld during the period of 150 days following his suspension from duties, as directed by ALJ Wilson in his November 14, 1985 decision, or forfeit his increments for the school years he was suspended, whichever is the greater.

The Commissioner further directs that as a condition of reinstatement to his teaching duties, Mr. Martin must fully participate in an acceptable alcohol treatment program operated by Alcoholics Anonymous or other program acceptable to Union Beach. It is further directed that no such program shall be acceptable unless the person in charge agrees to submit periodic reports on Mr. Martin's progress directly to the Union Beach Superintendent of Schools. Said reports shall be due no less frequently than once every month for the first six months, once every three months for the next six months, and once every six months thereafter. The Commissioner further directs that no such program shall be acceptable unless the person in charge agrees to notify the Union Beach Superintendent of Schools promptly in the event that Mr. Martin fails to comply with any requirements of the program and, further, that all costs of the treatment program shall be paid by Mr. Martin or his health insurance carrier and not by Union Beach. He notes that whether respondent has, during suspension, complied with the ALJ's directive to so enroll in an alcohol treatment program is irrelevant since the initial decision of the Office of Administrative Law is a recommended decision with no force of law until either adopted, rejected or modified by the Commissioner. (N.J.S.A. 52:14B) Thus, no obligation to so enroll arose based on the ALJ's recommended initial decision.

As to the Board's contention that any salary paid to respondent during the protracted litigation of this case creates "an obligation to seek employment elsewhere" (Board's Exceptions, at p. 4, quoting Tr., December 19, 1986, at p. 93), the Commissioner finds, contrary to the protestations of respondent, that such matter was raised at hearing on December 19, 1986 and, thus, is properly raised now again in the Board's timely exceptions of June 10, 1988. However, the Commissioner finds no merit in the Board's argument that employees suspended under the Tenure Employees Hearing Law are obligated to mitigate salary paid during such suspension. The Commissioner notes that this is not a reduction in force case where reasonable efforts to find employment in the field of training might be appropriate. Rather, under the instant circumstances, no such mitigation is required. See In the Matter of the Tenure Hearing of

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John Martz, School District of the Township of Franklin, Somerset County, 1976 S.L.D. 773. Therein, the Commissioner stated:

> A last matter remains. The benefits available to respondent by N.J.S.A. 18A:6-14 are to be afforded him, mitigated only by earnings from substituted employment. The statute is silent with respect to voluntary cessation of substituted employment. The Commissioner observes that the Legislature has stated precisely what it intended. Regular salary payments are to commence for employees who are suspended following the certification of charges, on the 121st day of suspension, mitigated by any sums earned from substituted employment. There is no requirement for a suspended employee to acquire substitute employment. Thus, the voluntary cessation of such employment may not be held to negate the clear intent of the law.
>
> Therefore, the Board of Education of Franklin Township is directed to compensate John Martz the difference between the benefits it provided him susbsequent to his termination of substituted employment and his full salary. All benefits pursuant to N.J.S.A. 18A:6-14 shall cease as of the date of this decision. (emphasis supplied) (at 790)

Thus, the Commissioner dismisses as being without merit the Board's contentions that respondent's employment history during his suspension is relevant to the merits of this matter, and limits the monetary penalties to those mentioned above, less any mitigation respondent may have assumed during that time.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

July 14, 1988

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J. MICHAEL MC QUESTON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE EASTERN CAMDEN COUNTY REGIONAL SCHOOL DISTRICT AND DONALD E. BEINEMAN, CAMDEN COUNTY,	:	DECISION
RESPONDENTS.	:	

For the Petitioner, Ross M. Levitsky, Esq.,

For the Respondent Board, Donio, Bertman, Jackson, Sahli and Greco (Ronald W. Sahli, Esq., of Counsel)

For the Respondent State, W. Carey Edwards, Attorney General of New Jersey (E. Philip Isaac, DAG)

This matter is being decided by the Commissioner as a result of a motion for summary decision having been submitted pursuant to N.J.A.C. 6:24-1.15 by Respondent State of New Jersey. A telephonic conference call was conducted with the attorneys for petitioner and Respondent Board on May 12, 1988, whereupon it was agreed that response briefs would be submitted by June 6, 1988. It was also stipulated that the facts of the matter are undisputed and are set forth in the papers already before the Commissioner. The record closed on June 9, 1988.

The pertinent facts of the matter are:

1. Petitioner, J. Michael McQueston, is the natural father of Matthew Adam McQueston, a sixteen-year-old student completing his junior year at Eastern High School.

2. Petitioner was previously married to Isabell McQueston, the mother of Matthew McQueston.

3. J. Michael McQueston and Isabell McQueston were divorced on or about December 8, 1977.

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Isabell McQueston was awarded custody of the children of the marriage, including the student subject to this matter, Matthew McQueston.

4. Subsequent to the above, Isabell McQueston remarried and is now known as Isabell Spina.

5. On March 5, 1981 Edward F. Menneti, Judge Superior Court, Chancery Division, Camden County, issued an order awarding certain visitation rights to petitioner with respect to his three unemancipated children, of which Matthew is one, and restraining and enjoining those three children from using any surname other than that of McQueston.

6. Isabell Spina has enrolled her son, Matthew McQueston, at Eastern High School by the name Matthew Spina.

7. Matthew has not been adopted by Mr. Spina nor does the record indicate any proceeding being brought by Mrs. Spina to have Matthew's surname changed to that of his stepfather.

8. The above facts have been brought to the attention of appropriate school authorities.

9. Petitioner has requested that the school amend its records to reflect the student's legal name, Matthew McQueston.

10. Respondent Board has refused this requested change, essentially on the grounds that it is not within its purview to enforce the above-referenced court order.

11. On February 17, 1988 Donald E. Beineman, Camden County Superintendent of Schools, wrote to petitioner's attorney in response to a February 10, 1988 letter from him to Dr. Beineman wherein Dr. Beineman affirmed the Board's position on the issue.

Petitioner seeks an order from the Commissioner compelling the Respondent Board to change the student's name on all school records to Matthew Adam McQueston.

POSITIONS OF THE PARTIES

Respondent State argues that it is clear this matter constitutes the enforcement of a specific provision arising out of a divorce decree and is, thus, outside of the jurisdiction of the

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Commissioner. The State maintains that it has long been the law in this State that "'[w]here [a] controversy does not arise under the school laws, it is outside the Commissioner's jurisdiction even though it may pertain to school personnel [Citation omitted].' Bd. of Ed. of E. Brunswick Tp. v. Tp. Council of E. Brunswick, 48 N.J. 94, 102 (1966)." (Respondent State's Brief in Support of Motion, at p. 2) It further argues that the New Jersey Supreme Court has established that in order for a dispute to deserve the judgment and jurisdiction of the Commissioner, the subject matter of the controversy must require his expertise (Bd. of Ed. of the City of Elizabeth v. City Council of Elizabeth, 55 N.J. 501, 508 (1970); Hinfey v. Matawan Regional Bd. of Ed., 77 N.J. 514, 532 (1978)) or must be controlled by the school laws. (Dunellen Bd. of Ed. v. Dunellen Ed. Assn., 64 N.J. 17, 28 (1973)).

Respondent State further argues that in those instances where a dispute finds its roots in school law, but later evolves into another area of substantive law, the Commissioner does not have jurisdiction in the matter. Bd. of Ed. of the Vocational School in the County of Camden v. CAM/VOC Teachers Assn., 183 N.J. Super. 206 (App. Div. 1982) It avers that in this matter petitioner seeks enforcement of the Chancery Division order issued in the aftermath of the McQuestons' divorce and thus has no relationship to the Commissioner's expertise in the field of education, stating that:

> ***Simply because Petitioner's child attends public school in New Jersey is insufficient for the Commissioner to assert jurisdiction -- jurisdiction which legitimately rests with the tribunal which issued McQueston's decree of divorce and any subsequent orders related thereto. Any action by Petitioner should thus be in the direction of the judicial enforcement of the court order upon which he now relies. See N.J.S.A. 2C:29-9 and N.J.S.A. 2A:10-1 et seq. which prescribe the remedy of contempt of court for those who wish the enforcement of judicial orders in civil actions. (State's Brief, at p. 3)

Moreover, the State argues that although decisional law has established that a divorced mother has no authority, absent extenuating circumstances, to change the surname of her children to that of the subsequent husband's and no authority to enroll her children in school under any name except the natural father's surname, it is equally clear that when such an action does occur, injunctive relief is the remedy to be invoked to obtain redress. Sobel v. Sobel, 46 N.J. Super. 284 (Ch. Div. 1957); see N.J.S.A. 2A:34-21 which unequivocally grants the judiciary the power of determining the use of a surname after a divorce decree and In re Lone, 134 N.J. Super. 213 (Law Div. 1975). As to this, the State urges that even though a bar exists for a divorced parent to altering the name of a child absent extenuating circumstances, it is up to the courts to determine whether or not extenuating circumstances exist to warrant a change of a child's surname. Sobel, supra Respondent State therefore argues that:

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> ***In short, as domestic relations, such as the dissolution of a marriage, are subject to the equitable jurisdiction of the courts, the Commissioner has no jurisdiction in this matter arising out of a divorce decree. Moreover, petitioner's attempt to require school authorities to enforce the relied-upon court order of Judge Menneti must fail as it is binding only upon the parties of said proceedings. Hence, petitioner must look to the judiciary, not to an administrative agency, for the enforcement of paragraph three of Judge Menneti's Order.
>
> (Id., at p. 4)

Respondent Board urges that it is not in a position to arbitrarily change the name of a student without first having received the appropriate documentation from the courts and/or the legal guardian who is known only as Isabell Spina. It contends that the controversy in this matter is between petitioner and Isabell Spina and, upon it being ultimately resolved and proper notice being received, it will make appropriate changes to its records, if so directed. Lastly, the Board avers that two other children of Mrs. Spina have attended and graduated from its high school, namely Toby Spina and Michael Spina.

Petitioner, on the other hand, urges that his purpose in filing a Petition of Appeal before the Commissioner is not to enforce a court order. Rather, he contends that school authorities have an affirmative obligation to keep accurate and correct records of their students. He points to N.J.A.C. 6:3-2.3 which refers to certain mandated pupil records as being:

> Personal data which identifies each pupil enrolled in the school district. These data shall include the pupil's name, address, date of birth, name of parent(s), citizenship and sex of the pupil.*** (emphasis added)
>
> (Petitioner's Response, at p. 2)

Petitioner avers that in this matter the Board was put on notice that its records concerning Matthew McQueston are incorrect, that is, his name is inaccurate; thus, the school records reflect a name which is not his legal name. As to this, petitioner points out that various authorized organizations, agencies and persons have access to pupil records under N.J.A.C. 6:3-2.5, thus, the information to be kept by the school must be accurate and correct so as not to provide incorrect and/or fraudulent information to a requesting party. Moreover, he asserts that when school authorities are advised of an inaccuracy and provided the correct information, it is incumbent upon them to make the appropriate change, not to seek a court order to accomplish the change.

As to Sobel, supra, petitioner agrees with the State's interpretation that a divorced mother could not, absent extenuating circumstances, change the surname of her children to that of her

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subsequent husband. He differs with the State's argument, however, that the only remedy is through the courts for injunctive relief, averring that the Board itself has the inherent authority and obligation to make the appropriate change when advised of an inaccuracy, such as in this matter where it is uncontroverted that the subject child's legal name is Matthew McQueston.

ANALYSIS AND CONCLUSIONS

Upon review of the facts and arguments advanced by the parties in this matter, the Commissioner determines that while it is true that schools are required to maintain pupil records, N.J.S.A. 18A:36-19 and N.J.A.C. 6:3-2.1 et seq., and that such records should be accurate and correct, this matter is, nonetheless, deemed beyond the jurisdictional authority granted him by N.J.S.A. 18A:6-9 for the following reasons.

The issue in this matter is one of enforcement of a court order arising out of the divorce of Isabell McQueston and petitioner. If the natural mother in this matter has violated the terms of the March 5, 1981 court order by enrolling Matthew in school under a surname other than his natural father's and by allowing the continued use of such other name, then petitioner's recourse is to the court from which the order originated, not to the Commissioner of Education.

There may or may not be extenuating circumstances which would allow for the use of a surname other than petitioner's; that determination, however, does not rest with the Commissioner but with the courts. Sobel, supra

Accordingly, Respondent State's Motion for Summary Judgment is granted. The matter is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

July 18, 1988

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